

LOAN DOCUMENT

PHOTOGRAPH THIS SHEET

TJAGSA

0

LEVEL

INVENTORY

DTIC ACCESSION NUMBER

Military Rule of Evidence...

DOCUMENT IDENTIFICATION

APR 1996

DISTRIBUTION STATEMENT A

Approved for Public Release
Distribution Unlimited

DISTRIBUTION STATEMENT

ACCESSION FOR

NTIS ☐ GRAM ☐
DTIC ☐ TRAC ☐
UNANNOUNCED ☐
JUSTIFICATION

BY

DISTRIBUTION/

AVAILABILITY CODES

DISTRIBUTION

AVAILABILITY AND/OR SPECIAL

A-1

DISTRIBUTION STAMP

DATE ACCESSIONED

DATE RETURNED

20060105 036

DATE RECEIVED IN DTIC

REGISTERED OR CERTIFIED NUMBER

PHOTOGRAPH THIS SHEET AND RETURN TO DTIC-FDAC

H
A
N
D
L
E

W
I
T
H

C
A
R
E

**MILITARY RULE OF EVIDENCE 404(b):
TOOTHLESS GIANT OF THE EVIDENCE WORLD**

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either the Judge Advocate General's School, the United States Army, or any other government agency.

by Bruce D. Landrum
Major, U.S. Marine Corps

44TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

April 1996

**MILITARY RULE OF EVIDENCE 404(b):
TOOTHLESS GIANT OF THE EVIDENCE WORLD**

Bruce D. Landrum
Major, U.S. Marine Corps

ABSTRACT: This thesis examines the history and evolution of the rules of evidence that have restricted admissibility of uncharged misconduct evidence in criminal cases. It then turns to the current developments in this area, including the adoption and interpretation of Federal and Military Rules of Evidence 404(b), and recent legislation that added Rules 413 and 414. This thesis concludes that Rule 404(b) is already interpreted to admit most, if not all, of the evidence sought to be admitted by new Rules 413 and 414; making the new rules unnecessary for their stated purpose. Since they present a substantial risk of improper application, are arguably unconstitutional, and send a bad message about our system of justice, Military Rules of Evidence 413 and 414 should be eliminated, or at least modified.

Table of Contents

I.	Introduction.....	1
II.	Origins of the "Uncharged Misconduct" Rule.....	3
	A. <i>The Accusatory System vs. the Inquisitory System...</i>	3
	B. <i>The Early Cases.....</i>	9
	C. <i>The Early Codifications.....</i>	22
	D. <i>Federal Rule of Evidence 404(b).....</i>	25
	E. <i>Military Rule of Evidence 404(b).....</i>	27
III.	Judicial Treatment of Federal Rule of Evidence 404(b) ..	32
	A. <i>Michelson Gives Way to Huddleston.....</i>	32
	B. <i>Rule 404(b) Constitutional Issues.....</i>	37
	1. <i>Double Jeopardy.....</i>	37
	2. <i>Due Process.....</i>	45
IV.	Judicial Treatment of Military Rule of Evidence 404(b) .	49
	A. <i>Pre-Military Rules of Evidence Practice.....</i>	49
	B. <i>Applying the Military Rules of Evidence.....</i>	52
	C. <i>Refining the Standard of Proof.....</i>	56
	D. <i>What Happened to Nexus?.....</i>	61
	E. <i>The Teeth Shift From Rule 404(b) to Rule 403.....</i>	65
	F. <i>The Special Case of Sex Offenses.....</i>	70
V.	New Federal Rules of Evidence 413 and 414.....	74
	A. <i>Origins of the New Rules.....</i>	75
	B. <i>Military Rules of Evidence 413 and 414.....</i>	81
VI.	Swinging Pendulums; Shifting Burdens.....	83

A.	<i>Applying Rule 404(b)</i>	83
B.	<i>Applying Rules 413 and 414</i>	88
1.	<i>What Evidence Comes In?</i>	88
2.	<i>How Will the Evidence Come In?</i>	95
C.	<i>Constitutional Questions</i>	99
1.	<i>Due Process</i>	100
2.	<i>Equal Protection</i>	109
3.	<i>Double Jeopardy</i>	117
D.	<i>Policy Questions</i>	119
E.	<i>Recommendations</i>	126
VIII.	<i>Conclusion</i>	136
APPENDIX A: Federal Rules of Evidence 413-415.....		A-1
APPENDIX B: Proposed Military Rules of Evidence 413-414.....		B-1

MILITARY RULE OF EVIDENCE 404(b):
TOOTHLESS GIANT OF THE EVIDENCE WORLD

MAJOR BRUCE D. LANDRUM

I. Introduction.

Rule 404(b) is probably the most frequently litigated rule of evidence.¹ Yet the evidence that it excludes actually falls within a very narrow range.² While the range may be narrow, the rule is a cornerstone of our system of justice.³ It mandates that we try an accused for the charged crime, not for his life's works. On the other hand, the rule is porous, and frequently the very evidence it purports to exclude, it admits for some other relevant purpose.⁴ Not a perfect world,

¹ See Stephen A. Saltzburg, *Trial Tactics: Proper and Improper Handling of Uncharged Crimes*, CRIM. JUST., Fall 1991, at 43 ("No rule is invoked more frequently in criminal cases than Fed. R. Evid. 404(b)...."); Edward J. Imwinkelried, *Uncharged Misconduct Evidence, Part I*, THE CHAMPION, Dec. 1993, at 12 ("In many states, alleged errors in the admission of uncharged misconduct are the most common ground for appeal in criminal cases."); Edward J. Imwinkelried, *The Use of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines that Threaten to Engulf the Character Evidence Prohibition*, 130 MIL. L. REV. 41, 43 (1990) ("Rule 404(b) has generated more published opinions than any other subsection of the Federal Rules.").

² See *infra* text accompanying notes 154-60, 306-30, 387-98.

³ See *infra* text accompanying notes 12-43, 428-36.

⁴ See *infra* text accompanying notes 154-60.

but a balancing act.

Now to this arena come new players. Our lawmakers have given us new rules 413 and 414, which in certain cases, allow the one narrow type of evidence that rule 404(b) actually excludes.⁵ In so doing, they have called into question the entire foundation of our criminal justice system.

This thesis will examine the history of the long-standing prohibition on propensity evidence, and how that history is being altered with the introduction of the new rules. Part II explores the origins of the rule against propensity evidence and its evolution.⁶ Part III relates the United States Supreme Court's interpretations of Federal Rule of Evidence 404(b).⁷ Part IV examines in detail how the United States Court of Appeals for the Armed Forces⁸ has applied Military Rule of Evidence 404(b).⁹ Part V introduces the new rules,¹⁰

⁵ See *infra* text accompanying notes 354-79.

⁶ See *infra* text accompanying notes 12-143.

⁷ See *infra* text accompanying notes 144-226.

⁸ On October 5, 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the name of the United States Court of Military Appeals to the United States Court of Appeals for the Armed Forces. This thesis will use the new name except when referring to a case decided under the old name.

⁹ See *infra* text accompanying notes 227-353.

¹⁰ See *infra* text accompanying notes 354-86.

and Part VI analyzes how the new rules will affect the evidence landscape.¹¹

II. Origins of the "Uncharged Misconduct" Rule.

A. *The Accusatory System vs. the Inquisitory System.*

The prohibition on using the accused's uncharged acts to prove criminal propensity or disposition has its origins, as does much of our law, in England.¹² Prior to the twelfth century, the primary methods of trial were wager of law, ordeal and battle.¹³ In the twelfth century, Henry II instituted major legal reforms credited with the introduction of the jury trial as the norm in England.¹⁴ He established a permanent court of professional judges, and through his procedural instructions to those judges, was responsible for the emergence of the "inquest" as a procedure available to the

¹¹ See *infra* text accompanying notes 387-520.

¹² EDWARD J. IMWINKELRIED, *UNCHARGED MISCONDUCT EVIDENCE* § 2:24 (1984 & Supp. 1995); Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 991 (1938) [hereinafter *Stone, America*]; Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954 (1933) [hereinafter *Stone, England*].

¹³ 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF THE ENGLISH LAW* 136-50 (2d ed. 1899); 2 *Id.* at 603, 656; 4 WILLIAM BLACKSTONE, *COMMENTARIES* *414-15; Thomas J. Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials*, 50 U. CIN. L. REV. 713, 715 (1981).

¹⁴ 1 POLLOCK & MAITLAND, *supra* note 13, at 138, 144, 149-50.

public at large.¹⁵ This inquest was the forerunner of the trial by jury as we know it. Pollock & Maitland trace the origins of the inquest to the Frankish kings, who used it to by-pass the formalistic legal procedures of the day (such as the ordeal) and to actually give them "short cuts to the truth."¹⁶ The Frankish kings apparently modeled this inquest after procedures employed by ancient Roman law.¹⁷

While the early English law had developed an accusatory system,¹⁸ the difficulty of obtaining convictions under this

¹⁵ 1 *Id.* at 136-38.

¹⁶ 1 *Id.* at 140-41.

¹⁷ *Id.*

¹⁸ 2 *Id.* at 656-58. An accusatory system is one in which the court only tries the charge or pleading placed before it. In contrast, an inquisitorial system gives the court broad powers to inquire into any matter in a search for the truth. BLACK'S LAW DICTIONARY 22 (6th ed. 1990) (defining "Accusatory procedure" as the "System of American jurisprudence in which the government accuses and bears the burden of proving the guilt of a person for a crime; to be distinguished from inquisitorial system.") In the early English law two inquests were used, one to indict (like our grand juries) and the other to try the case. Thus the second inquest was limited in the matters it could consider. 2 POLLOCK & MAITLAND, *supra* note 13, at 648-49, 656-58. Initially the same inquest was used for both indictment and trial, but as the desire for impartiality grew, the accused was given the right be tried by a different inquest. *Id.* at 648-49. Some commentators have noted the inquisitorial nature of the early jury system. See, e.g., Glen Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b)*, 70 IOWA L. REV. 579, 583 n.17 (1985). This is a valid observation, but it uses the word "inquisitorial" in a different sense. While the inquest may have been inquisitorial as opposed to adversarial, the accusatory system of only trying the indictment placed before it distinguished it from the more inquisitorial proceedings of the

system had led to widespread use of inquisitorial proceedings.¹⁹ The ecclesiastical courts pursuing heretics in the twelfth and thirteenth centuries were especially fond of the inquisitorial approach.²⁰ According to Pollock & Maitland: "Every safeguard of innocence was abolished or disregarded; torture was freely used. Everything seems to be done that can possibly be done to secure a conviction."²¹ But the twelfth century reforms of Henry II had prevented the inquisition from taking firm hold in the secular English courts.²²

The fact that Henry II had chosen the accusatory path over the inquisitory path did not stop later English monarchs from using an inquisitorial proceeding in their own Court of Star Chamber, where they tried their enemies for treason or any other breach of state orders.²³ While the Star Chamber had ancient origins, it was "new-modelled" by Henry VII as a device to extort money from his subjects and increase his wealth.²⁴ In these proceedings, the jury was discarded in

ecclesiastical courts.

¹⁹ 2 POLLOCK & MAITLAND, *supra* note 13, at 656.

²⁰ 2 *Id.* at 657.

²¹ *Id.*

²² 2 *Id.* at 658.

²³ 4 BLACKSTONE, *supra* note 13, at *263; IMWINKELRIED, *supra* note 12, § 2:24; Reed, *supra* note 13, at 716-17.

²⁴ 4 BLACKSTONE, *supra* note 13, at *422 ("To this end [(amassing wealth)] the court of star-chamber was new-

favor of a panel of royal justices, and the prosecutor proved the unspecified charges with witness affidavits given in advance, and out of the presence of the accused.²⁵ The accused had no opportunity to confront his accusers, and very little opportunity to present any defense at all, due to the trial by ambush that usually occurred.²⁶

While Charles I abolished the Court of Star Chamber shortly before rebellion broke out in England over these and other abuses, its evils were not soon forgotten.²⁷ One of the reforms Parliament later enacted to respond to such abuses was the Treason Act of 1695.²⁸ In addition to giving the accused the right to advance notice of the charges, this law also limited the proof at trial to only the acts charged.²⁹ The

modelled, and armed with powers, the most dangerous and unconstitutional, over the persons and properties of the subject.").

²⁵ 4 *Id.* at *263; Reed, *supra* note 13, at 716.

²⁶ Reed, *supra* note 13, at 716-17.

²⁷ 4 BLACKSTONE, *supra* note 13, at *430.

²⁸ 4 *Id.* at *433; Reed, *supra* note 13, at 717; IMWINKELRIED, *supra* note 12, § 2:24.

²⁹ An Act for Regulating of Trials in Cases of Treason and Misprision of Treason (Treason Act of 1695), 7 Will. 3, ch. 3, § 8 ("And it be further enacted, That no evidence shall be admitted or given of any overt act that is not expressly laid in the indictment against any person or persons whatsoever.") *cited in* 4 BLACKSTONE, *supra* note 13, at *350; Reed, *supra* note 13, at 717; Stone, *England*, *supra* note 12, at 958. Blackstone paraphrased the statute but preserved the meaning.

primary purpose of the exclusion of uncharged acts was apparently to prevent trial by ambush. This rule is the earliest indication of any codified limit on proving the accused's uncharged misconduct.³⁰

The fact that rules limiting trial evidence did not exist prior to this time is not surprising. When the jury trial began it was a much different institution than the one we know today. In early times the jury had to be drawn from the neighborhood where the cause of action arose.³¹ The jurors investigated the facts before trial and could hear the stories of the litigants.³² In a sense the jurors were witnesses as well.³³ According to Blackstone the jury was "supposed to know before-hand the **characters** of the parties and witnesses...."³⁴ Pollock & Maitland summed up the situation saying: "On the whole, trial by jury must have been in the main a trial by general repute."³⁵ Any rule excluding evidence would have

³⁰ Stone, *England, supra* note 12, at 958; Reed, *supra* note 13, at 716-17. Wigmore cites two earlier cases that held uncharged acts inadmissible in cases other than treason. 1A JOHN H. WIGMORE, EVIDENCE § 58.2, at 1213 nn. 1-2 (Peter Tillers rev. 1983) (citing *Hampden's Trial*, 9 How. St. Tr. 1053, 1103 (K.B. 1684) and *Harrison's Trial*, 12 How. St. Tr. 833, 864 (Old Bailey 1692)).

³¹ 3 BLACKSTONE, *supra* note 13, at *359.

³² 2 POLLOCK & MAITLAND, *supra* note 13, at 627.

³³ *Id.*

³⁴ 3 BLACKSTONE, *supra* note 13, at *359 (emphasis added).

³⁵ 2 POLLOCK & MAITLAND, *supra* note 13, at 655.

served no purpose in that type of jury trial.

According to Blackstone, the English law recognized the key defect of this system and, over time, corrected it.³⁶ While knowing the parties helped jurors decide how much credit to give their stories, the problem was that jurors might act on their prejudices and partialities instead of on facts.³⁷ As jury impartiality became more important, the requirement of neighborhood jurors was gradually relaxed and finally totally abolished.³⁸ Only with the advent of impartial juries would an exclusionary rule have any real impact. Perhaps the fact that Blackstone in 1768 identified jury bias and partiality as a defect in the English system³⁹ influenced later courts to increasingly apply just such a rule.

In time, the exclusionary rule first codified in the Treason Act became the norm in trials other than for treason as well.⁴⁰ Legal authorities seemed to recognize it as a

³⁶ 3 BLACKSTONE, *supra* note 13, at *360.

³⁷ *Id.*

³⁸ *Id.*

³⁹ 3 BLACKSTONE, *supra* note 13, at *383.

⁴⁰ Reed, *supra* note 13, at 717; Stone, *England, supra* note 12, at 958-59. Of course some courts had applied the rule in non-treason cases even before the Treason Act became law. See *supra* note 30.

requirement of basic due process and fairness.⁴¹ But the rule was much more limited than it appeared to be on its face. Courts often held the rule did not apply to uncharged acts that were relevant to prove the charged acts.⁴² In effect then, this was really no more than a rule excluding irrelevant evidence.⁴³ But through the development of the common law, it became much more.

B. The Early Cases.

Professor Stone's two articles on the Exclusion of Similar Fact Evidence in England and America, at the time he wrote them, represented the most authoritative effort to trace the development of the uncharged misconduct rule from its origins.⁴⁴ Despite his exhaustive research, he could only trace the rule against proving criminal propensity with uncharged misconduct evidence to an apparently unpublished

⁴¹ Reed, *supra* note 13, at 717.

⁴² Stone, *England*, *supra* note 12, at 958.

⁴³ *Id.* at 959.

⁴⁴ Stone, *America*, *supra* note 12; Stone, *England*, *supra* note 12; IMWINKELRIED, *supra* note 12, § 2:26; Norman Krivosha et al., *Relevancy: The Necessary Element in Using Evidence of Other Crimes, Wrongs, or Bad Acts To Convict*, 60 NEB L REV 657, 662 (1981); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, 'TRUTH IN CRIMINAL JUSTICE' SERIES, REPORT No. 4, *The Admission of Criminal Histories at Trial* (1986), [hereinafter DOJ REPORT], reprinted in 22 U. MICH. J.L. REF. 707, 718 (1989).

case noted in an Evidence treatise.⁴⁵ In that 1810 case, *Rex v. Cole*, the court held that "in a prosecution for an infamous crime, an admission by the prisoner that he had committed such an offence at another time and with another person, and that he had a tendency to such practices, ought not to be admitted."⁴⁶ This report of the decision, said Stone, was "the one unchallenged starting-point for all the nineteenth century decisions."⁴⁷

While many of the cases and commentators of later years seemed to recognize a broad rule excluding all evidence of an accused's past misdeeds unless an exception applied, few cases prior to 1850 stated such a rule.⁴⁸ Instead most of the cases admitted uncharged misconduct evidence on theories of relevance other than propensity, a practice not forbidden by

⁴⁵ Stone, *England*, *supra* note 12, at 959. Prior cases had held uncharged misconduct inadmissible, apparently on the theory that it was irrelevant, but none had explicitly stated a rule that relevant propensity evidence should be inadmissible. See *supra* note 30.

⁴⁶ Stone, *England*, *supra* note 12, at 959 (quoting SAMUEL M. PHILLIPS, *LAW OF EVIDENCE* 69-70 (1814)). In a later edition, Phillips cited the case as "*Rex v. Cole*, Mich. term 1810, by all the judges, MS," but I have also been unable to locate any other report of the case. SAMUEL M. PHILLIPS, *LAW OF EVIDENCE* 143 n.3 (New York, Gould 3d Am. ed. 1823). (Note that "Phillips" has also been spelled "Phillipps" and both spellings appear on these books in various places.)

⁴⁷ Stone, *England*, *supra* note 12, at 959.

⁴⁸ *Id.* at 965.

the *Rex v. Cole* rule.⁴⁹ The rule until that time appeared to be an inclusionary rule, admitting the evidence for any relevant purpose unless the sole purpose was to prove propensity to commit the crime.⁵⁰

After 1850, however, the cases began to shift toward an exclusionary rule with limited exceptions.⁵¹ As courts would issue opinions explaining their alternative theories of non-propensity relevance, they tended to list the examples found in the case law to date.⁵² Through the natural practice of the common law to look for precedent, some courts tended to crystallize the relevant purposes for the use of uncharged misconduct into the list they were able to find in the cases.⁵³ Over time, courts began to regard this list as exclusive of other new relevant purposes.⁵⁴ On the other hand, many cases decided during this period still applied the inclusionary rule, so the actual state of the law in England was unsettled.⁵⁵

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 966; IMWINKELRIED, *supra* note 12, § 2:25.

⁵² Stone, *England*, *supra* note 12, at 966-73.

⁵³ *Id.* at 966.

⁵⁴ *Id.* at 966-73.

⁵⁵ *Id.* at 970; IMWINKELRIED, *supra* note 12, § 2:25; Krivosha et al., *supra* note 44, at 664-65.

In 1894, the case of *Makin v. Attorney General of New South Wales*⁵⁶ clarified the English rule. In the Makins' trial for murdering an infant in their care and burying the body in the back yard, the prosecutor used evidence that the bodies of other infants had been found buried at their three previous residences.⁵⁷ Along with evidence of prior similar cases of women entrusting their children to the Makins as adoptive parents and never seeing the children again, this evidence was held relevant to the issues of the Makins' intent in adopting the child and whether or not the death was accidental.⁵⁸

On appeal, the Privy Council stated the prohibition on proving uncharged crimes to show "the accused is a person likely from his criminal conduct or character to have committed the offence...."⁵⁹ But the decision also stated that such evidence was not automatically inadmissible if "relevant to an issue before the jury" such as the issue of accident "or to rebut a defence which would otherwise be open to the accused."⁶⁰ This open-ended escape clause from the uncharged misconduct prohibition clearly established the inclusionary

⁵⁶ 1894 App. Cas. 57 (P.C. 1893). Apparently the case was decided in 1893, but not reported until the 1894 volume of Law Reports.

⁵⁷ *Id.* at 58-59, 68.

⁵⁸ *Id.* at 68; Stone, *England*, *supra* note 12, at 974.

⁵⁹ 1894 App. Cas. at 65.

⁶⁰ *Id.*

rule in England.⁶¹ Despite the fact that some courts misinterpreted *Makin* in the years that followed, the vast majority have cited the decision for the proposition that the list of so-called "exceptions" is merely illustrative and not exhaustive.⁶²

As for the American rule, our courts drew heavily from the English decisions, and until the beginning of this century, generally followed the same path.⁶³ In 1901, the case of *People v. Molineux*⁶⁴ marked the divergence of the paths.⁶⁵ In Molineux's murder trial, the prosecution alleged that he had sent a poisoned box of "bromo seltzer" to Harry Cornish, his intended victim, who had then accidentally poisoned Mrs. Adams, the actual victim.⁶⁶ To try to explain the unusual circumstances surrounding this murder, the prosecution used evidence of a similar murder of another of Molineux's enemies two months before.⁶⁷ The New York Court of Appeals reversed

⁶¹ Stone, *England*, *supra* note 12, at 975; IMWINKELRIED, *supra* note 12, § 2:25.

⁶² Stone, *England*, *supra* note 12, at 975.

⁶³ Stone, *America*, *supra* note 12, at 989-93; IMWINKELRIED, *supra* note 12, § 2:26; Krivosha et al., *supra* note 44, at 665-67; Reed, *supra* note 13, at 720-23.

⁶⁴ 61 N.E. 286 (N.Y. 1901).

⁶⁵ Stone, *America*, *supra* note 12, at 1023; Krivosha et al., *supra* note 44, at 668-69.

⁶⁶ 61 N.E. at 287.

⁶⁷ *Id.* at 289-91.

the conviction, unanimously holding the evidence should not have been admitted.⁶⁸

The four judges joining the lead opinion viewed the evidence as clearly inadmissible uncharged misconduct.⁶⁹ The three judges joining the minority opinion viewed the evidence as potentially relevant to a non-propensity purpose, but found a fatal lack of proof that Molineux was responsible for the first murder.⁷⁰ The lead opinion, while admitting that the exceptions "cannot be stated with categorical precision," nevertheless espoused the exclusionary approach to the uncharged misconduct rule.⁷¹ It stated the general rule of exclusion and then listed five recognized exceptions: to prove motive; intent; absence of mistake or accident; common scheme or plan; and identity.⁷² Contrary to what was happening in England, this opinion shifted the direction of many American jurisdictions toward the exclusionary rule.⁷³ It also inspired the familiar MIMIC⁷⁴ mnemonic for pigeon-holing uncharged

⁶⁸ *Id.* at 310-12.

⁶⁹ *Id.* at 303.

⁷⁰ *Id.* at 312.

⁷¹ *Id.* at 294.

⁷² *Id.*

⁷³ Stone, *America*, *supra* note 12, at 1023; Krivosha et al., *supra* note 44, at 669; IMWINKELRIED, *supra* note 12, § 2:27.

⁷⁴ MIMIC stands for: **M**otive, **I**ntent, absence of **M**istake or accident, **I**ntity, and **C**ommon scheme or plan.

misconduct evidence admissible for non-propensity purposes.⁷⁵

While the majority of states adopted the exclusionary approach to uncharged misconduct, a solid minority always retained the inclusionary approach.⁷⁶ The federal approach never really became settled. In the 1918 case of *Greer v. United States*,⁷⁷ Justice Holmes made clear that federal evidence law followed the common law rule that the prosecution could not prove the character of the accused unless the defense opened the door to it.⁷⁸ Thirty years later, in *Michelson v. United States*,⁷⁹ Justice Jackson was more specific in stating that this prohibition included proving character by uncharged misconduct.⁸⁰

The real issue in *Michelson* was the propriety of the prosecutor cross-examining defense character witnesses on whether or not they had heard about a prior arrest.⁸¹ In arriving at the decision of that issue, however, the Court reviewed the state of the law regarding character evidence as

⁷⁵ IMWINKELRIED, *supra* note 12, § 2:27.

⁷⁶ IMWINKELRIED, *supra* note 12, §§ 2:27, 2:29.

⁷⁷ 245 U.S. 559 (1918).

⁷⁸ *Id.* at 560.

⁷⁹ 335 U.S. 469 (1948).

⁸⁰ *Id.* at 475-76.

⁸¹ *Id.* at 472.

a whole:

Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt....The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.⁸²

In a footnote, the opinion discussed the "well-established exceptions" to this general rule and cited examples, giving the opinion the definite appearance of an exclusionary approach.⁸³ The reason for the exclusion was not because the uncharged misconduct was irrelevant, but because it tended to cause "confusion of issues, unfair surprise and undue prejudice."⁸⁴ Ultimately the court held that allowing cross-examination about the prior arrest was within the discretion of the trial judge.⁸⁵ Since the defense had opened the door to this by presenting character evidence, the defendant had no

⁸² *Id.* at 475 (footnote omitted).

⁸³ *Id.* at 475 n.8.

⁸⁴ *Id.* at 476.

⁸⁵ *Id.* at 486-87.

valid complaint about the prosecution being able to rebut it.⁸⁶

While the majority opinion appeared to state an exclusionary approach to uncharged misconduct in the prosecution case-in-chief, it thus took an inclusionary approach in the area of rebuttal. This, the Court said, was based primarily on the common law of character evidence developed primarily in the various state courts.⁸⁷ In a short concurring opinion, Justice Frankfurter struck a blow for applying the inclusionary approach across the board: "I believe it to be unprofitable, on balance, for appellate courts to formulate rigid rules for the exclusion of evidence in courts of law that outside them would not be regarded as clearly irrelevant in the determination of issues."⁸⁸ Perhaps this logically appealing statement foreshadowed the current trend back toward the inclusionary view.

Justice Rutledge, on the other hand, dissented, arguing for a more exclusionary approach to rebuttal evidence.⁸⁹ In his review of character evidence law, he also harkened back to the common law roots of the system:

⁸⁶ *Id.* at 485.

⁸⁷ *Id.* at 486-87.

⁸⁸ *Id.* at 487.

⁸⁹ *Id.* at 488-96.

Imperfect and variable as the scheme has become in the application of specific rules, on the whole it represents the result of centuries of common-law growth in the seeking of English-speaking peoples for fair play in the trial of crime and other causes.... Our whole tradition is that a man can be punished by criminal sanctions only for specific acts defined beforehand to be criminal, not for general misconduct or bearing a reputation for such misconduct. That tradition lies at the heart of our criminal process. And it is the foundation of the rule of evidence which denies to the prosecution the right to show generally or by specific details that a defendant bears a bad general estimate in his community.⁹⁰

Despite the prevalence of the exclusionary view of the uncharged misconduct rule in the first half of this century, the inclusionary approach began to make a come-back,⁹¹ probably due, at least in part, to Professor Stone's persuasively written article in which he dubbed the exclusionary approach as "the Spurious Rule."⁹² The 1973 case of *United States v.*

⁹⁰ *Id.* at 489-90.

⁹¹ See IMWINKELRIED, *supra* note 12, § 2:29.

⁹² Stone, *America*, *supra* note 12, at 1000. See DOJ REPORT, *supra* note 44, reprinted at 22 U. MICH. J.L. REF. 707, at 718.

Woods,⁹³ though only representing the law in one federal circuit, illustrates the inclusionary trend in federal evidence law. Martha Woods was charged with murdering her infant foster son by smothering him.⁹⁴ The government forensic pathologist was only 75 percent sure the death was a homicide.⁹⁵ To prove homicide, the prosecution proved that nine other children, seven of whom had died, had experienced at least 20 episodes of respiratory difficulties⁹⁶ while in the care or control of the defendant.⁹⁷

In upholding the use of this uncharged misconduct evidence, the *Woods* court first stated the clear relevance of the prior acts to prove that the death was a homicide and that Mrs. Woods was the perpetrator.⁹⁸ In the court's view, the evidence concerning all ten children, considered together, made any other conclusion totally improbable. The court also cited the necessity of using evidence of repeated incidents in child abuse cases, where the defenseless victim cannot

⁹³ 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974).

⁹⁴ *Id.* at 128-30.

⁹⁵ *Id.* at 130.

⁹⁶ The court used the term "cyanosis" and defined this as "a blue color, principally around the lips, due to a lack of oxygen." *Id.* at 129-30.

⁹⁷ *Id.* at 130.

⁹⁸ *Id.* at 133.

testify, as making the evidence "especially relevant."⁹⁹ As for the general prohibition on uncharged misconduct evidence, the court examined the exceptions the government had argued and concluded that the "accident" and "signature" exceptions applied.¹⁰⁰ But the court went on to say that trying to fit the evidence into a recognized exception was "too mechanistic an approach," and proceeded to espouse all four corners of the inclusionary approach to the rule.¹⁰¹ The court stated the rule as follows:

[O]ther offenses may be received, if relevant, for any purpose other than to show a *mere* propensity or disposition on the part of the defendant to commit the crime, provided that the trial judge may exclude the evidence if its probative value is outweighed by the risk that its admission will create a substantial danger of undue prejudice to the accused.¹⁰²

Hence the *Woods* court helped lay the groundwork for the

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 134.

¹⁰¹ *Id.*

¹⁰² *Id.* (emphasis added). If this rule sounds very similar to the Federal Rules of Evidence 402-404 that were ultimately adopted this is no coincidence. The court cited the proposed rules in a footnote. *Id.* at 134 n.9.

ultimate adoption of this type of inclusionary rule as part of the Federal Rules of Evidence in 1975.

Both the English and American rules, whether inclusionary or exclusionary, recognized the basic principle that uncharged misconduct could not be proven *solely* to show propensity to commit crime. Yet in a small category of cases, "unnatural offenses," an exception to even this bedrock principle developed in some jurisdictions.¹⁰³ The theory was that the propensity to commit certain types of offenses - generally indecent acts with children - is so rare that if a person has shown it, that propensity is more of a "physical peculiarity" than a general criminal propensity.¹⁰⁴ This exception has come to be known as the "lustful disposition rule" in some jurisdictions and has been extended to cover other sex offenses that probably would not meet the original definition of "unnatural offenses."¹⁰⁵ While the logic of the theory

¹⁰³ See Julius Stone, *Propensity Evidence in Trials for Unnatural Offences*, 15 AUSTL. L. J. 131 (1941); Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127 (1993).

¹⁰⁴ Stone, *supra* note 103, at 133.

¹⁰⁵ Reed, *supra* note 103, at 168-69. Professor Reed's article provides a thorough review of the history and development of the "lustful disposition rule" in the various English and American jurisdictions. He cites *State v. Ferrand*, 27 So. 2d 174, 178 (La. 1946), as the source of the name of the rule, but also notes that other similar names have been used. Reed, *supra* note 103, at 168 n. 230 (citing *Woods v. State*, 235 N.E.2d 479, 486 (Ind. 1968) (the "depraved sexual instinct" rule) and *State v. Schut*, 429 P.2d 126, 128 (Wash. 1967) (the "lustful inclination" rule)). While some

seems instinctively appealing, the idea that certain types of crimes are more likely to be repeated than others has been criticized as spurious.¹⁰⁶ Nevertheless, this common law exception undoubtedly played a role in the genesis of the new Federal Rules of Evidence that allow just such evidence.

C. *The Early Codifications.*

Because the law was unsettled in this country as to which view of the uncharged misconduct rule was correct, several states codified various versions of the rule.¹⁰⁷ As early as 1923, the American Law Institute had considered restating the Law of Evidence, but the idea was rejected as unfeasible due

jurisdictions have limited the rule to proof of uncharged sex acts with the same victim, others have extended the rule to proof of any prior (or later) similar sex acts with any victim. *Id.* at 176.

¹⁰⁶ *Id.* at 159 n.181. Professor Reed also reviews the validity of "lustful disposition" inferences based on empirical evidence. He concludes that, while many courts have presumed the value of prior rape evidence in predicting a later rape, the assumption that rapists are sexual psychopaths is unfounded. Research indicates that rapists tend to be violent, and prior rapes are more a predictor of future violence than of future sex crimes. *Id.* at 147-50 (citing Joseph J. Romero & Linda M. Williams, *Recidivism Among Convicted Sex Offenders: A 10-Year Follow Up Study*, FED. PROBATION, March 1985). See *infra* note 494. Child molesters, on the other hand, do tend to have a higher recidivism rate than previous studies have shown, but no higher than for other crimes. The under-reporting of those types of crimes has artificially reduced those rates. *Id.* at 149 n.117, 150-53 (citing A. Nicholas Groth et al., *Undetected Recidivism among Rapists and Child Molesters*, 28 CRIME & DELINQUENCY 450 (1982)). See *infra* notes 467, 492.

¹⁰⁷ IMWINKELRIED, *supra* note 12, § 2:28.

to the case law conflicts between states and even within states.¹⁰⁸ Perhaps more importantly, the council of the Institute considered the rules of evidence, as they existed then, to be counter-productive in many ways to the goal of finding the truth.¹⁰⁹ But after the 1938 debut of the Federal Rules of Civil Procedure, many of which deal with evidence issues, interest in codifying the rules of evidence grew.¹¹⁰ In 1939, the American Law Institute began work on the Model Code of Evidence, promulgating it in 1942.¹¹¹ Model Code of Evidence, Rule 311, dealt with the issue of uncharged misconduct by providing that:

[E]vidence that a person committed a crime or civil wrong on a specified occasion is inadmissible as tending to prove that he committed a crime or civil wrong on another occasion if, but only if, the evidence is relevant solely as tending to prove his disposition to commit such a crime or civil wrong or to commit crimes or civil wrongs generally.¹¹²

¹⁰⁸ NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *Commissioners' Prefatory Note* to UNIF. R. EVID. (1974) [hereinafter UNIF. R. EVID. *Prefatory Note*].

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² MODEL CODE OF EVIDENCE Rule 311 (1942), reprinted in IMWINKELRIED, *supra* note 12, § 2:28.

The drafters apparently included the "if, but only if" language of this rule to make crystal clear to courts interpreting it that it prohibited only one very narrow use of uncharged misconduct evidence, an inclusionary approach.

In 1948, the National Conference of Commissioners on Uniform State Laws decided that Evidence Law was an appropriate topic for a uniform act.¹¹³ After studying the Model Code of Evidence, among other materials, the commissioners promulgated the Uniform Rules of Evidence in 1953.¹¹⁴ Uniform Rule of Evidence 55, which covered the handling of uncharged misconduct evidence, read as follows:

[E]vidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong ... on another specified occasion, but ... such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge, or identity.¹¹⁵

¹¹³ UNIF. R. EVID. *Prefatory Note*, *supra* note 108.

¹¹⁴ *Id.*

¹¹⁵ UNIF. R. EVID. 55 (1953), *reprinted in* IMWINKELRIED, *supra* note 12, § 2:28.

While less clearly inclusionary, this rule more closely resembles the ultimately adopted Federal Rule of Evidence 404(b) in that it states a general prohibition, but then gives a non-exhaustive list of situations to which the general prohibition would not apply.

D. *Federal Rule of Evidence 404(b)*.

In 1961, the Judicial Conference of the United States established a special committee to determine the feasibility of creating uniform evidence rules for federal courts.¹¹⁶ This committee recommended in favor of uniform rules in 1962,¹¹⁷ and in 1965, Chief Justice Warren appointed an Advisory Committee to begin drafting.¹¹⁸ Not until 1969 did the Advisory Committee circulate its Preliminary Draft.¹¹⁹ After the Revised Draft circulated in 1971, the Supreme Court sent the rules to Congress for enactment in 1972.¹²⁰ After some Congressional modifications, the Federal Rules of Evidence for United States Courts and Magistrates became law, effective

¹¹⁶ UNIF. R. EVID. *Prefatory Note*, *supra* note 108.

¹¹⁷ *Id.*

¹¹⁸ Edward W. Cleary, *Introduction to FED. R. EVID.* (West 1987).

¹¹⁹ *Id.*

¹²⁰ *Id.*

July 1, 1975.¹²¹

These Federal Rules of Evidence contained the provision that many a trial practitioner has come to know and love, Rule 404(b):

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.¹²²

In 1991, the final period was changed to a comma and the following language was added at the end:

provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such

¹²¹ Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (establishing rules of evidence for certain courts and proceedings).

¹²² FED. R. EVID. 404(b).

evidence it intends to introduce at trial.¹²³

The use of the words "such as" in the second sentence indicates that the list of admissible purposes given here is merely exemplary and non-exhaustive. The legislative history also amply demonstrates that the intent of this rule is to admit more uncharged misconduct evidence than the old exclusionary approach.¹²⁴ Despite its apparently inclusionary formulation, however, some courts have treated this rule's list of admissible purposes as an exclusive list of exceptions to the broad exclusionary rule.¹²⁵ But most of the Federal Courts applying Rule 404(b) today would take the inclusionary view and, subject to Rule 403,¹²⁶ admit any uncharged misconduct evidence relevant to any fact in issue other than the propensity of the accused to commit crime.¹²⁷

E. Military Rule of Evidence 404(b).

At the time that the Federal Rules of Evidence were being drafted, the military already had a codified set of evidence rules, found in Chapter XXVII of the *Manual for Courts-*

¹²³ *Id.* (1991 amendment).

¹²⁴ IMWINKELRIED, *supra* note 12, § 2:30.

¹²⁵ *Id.*

¹²⁶ *See infra* text accompanying notes 154-67, 306-32.

¹²⁷ IMWINKELRIED, *supra* note 12, § 2:30.

Martial.¹²⁸ The President had promulgated these rules, starting in 1951, within his rule-making authority under Article 36 of the Uniform Code of Military Justice.¹²⁹ Paragraph 138g of these rules, entitled "Evidence of other offenses or acts of misconduct of the accused,"¹³⁰ for the most part embodied the same type of inclusionary rule that was being incorporated into Rule 404(b).¹³¹ It read as follows:

The **general rule** is that evidence of other offenses or acts of misconduct of the accused is **not admissible** as tending to prove his guilt, for ordinarily this evidence would be useful only for the purpose of raising an inference that the accused has a **disposition** to do acts of the kind charged or criminal acts in general and, if the disposition thus inferred was to be made the basis for an inference that he did the act charged, the rule forbidding the drawing of an inference of guilt from evidence of the bad moral character of the accused would apply. **However**, if evidence of other offenses

¹²⁸ MANUAL FOR COURTS-MARTIAL, United States, ch. XXVII (rev. ed. 1969) [hereinafter 1969 MANUAL].

¹²⁹ 10 U.S.C. § 836 (1994); STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL x (3d ed. 1991 & Supp. 1995).

¹³⁰ 1969 MANUAL, *supra* note 128, ¶ 138g.

¹³¹ MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 404(b) analysis, app. 22 (1995 ed.) [hereinafter MCM]. *But see infra* note 233 and accompanying text.

or acts of misconduct of the accused has substantial value as **tending to prove something other** than a fact to be inferred from the disposition of the accused **or is offered in proper rebuttal** of matters raised by the defense, the reason for excluding the evidence is not applicable.¹³²

This paragraph went on to give some specific examples of admissible and inadmissible purposes for using uncharged misconduct evidence, most of which parallel the examples listed in Federal Rule of Evidence 404(b), but with much greater detail.¹³³

Article 36 of the Uniform Code of Military Justice required the President, "so far as he consider[ed] practicable, [to] apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States District Courts."¹³⁴ Paragraph 137 of the 1969 *Manual for Courts-Martial* recognized that military evidence rules were drawn from the rules applied in federal courts, and pointed to those rules and the common law as sources for filling gaps in the military rules.¹³⁵ So the

¹³² 1969 MANUAL, *supra* note 128, ¶ 138g (emphasis added).

¹³³ 1969 MANUAL, *supra* note 128, ¶ 138g(1)-(7).

¹³⁴ 10 U.S.C. § 836 (1994).

¹³⁵ 1969 MANUAL, *supra* note 128, ¶ 137.

similarity between the military uncharged misconduct rule and the Federal Rule of Evidence that was in drafting was no coincidence. Even before the Military Rules of Evidence became effective, military judges would have been looking to case law interpreting the new Federal Rule of Evidence 404(b) to fill any gaps in the military rule at paragraph 138g. When the Military Rules of Evidence ultimately took the place of the prior rules in 1980, a certain body of case law and common understanding carried over and was grafted onto the new shorter rule.¹³⁶

While Congress and the Supreme Court were involved in creating the Federal Rules of Evidence, the Executive branch alone created the Military Rules of Evidence.¹³⁷ This fact makes little difference in the area of uncharged misconduct, however, because Military Rule of Evidence 404(b) is almost identical to Federal Rule of Evidence 404(b). The only difference is in the recent amendment regarding advance notice to the accused of intent to use 404(b) evidence.¹³⁸ The military version of the amendment merely changes some wording

¹³⁶ See MCM, *supra* note 131, MIL. R. EVID. 404(b) analysis, app. 22 ("Rule 404(b) provides examples rather than a list of justifications for admission of evidence of other misconduct. Other justifications ... expressly permitted in Manual ¶ 138g ... remain effective.").

¹³⁷ SALTZBURG ET AL., *supra* note 129, at x-xi.

¹³⁸ MCM, *supra* note 131, MIL. R. EVID. 404(b) analysis, app. 22.

to reflect the terminology of military courts.¹³⁹

The similarity between the Federal and Military Rules of Evidence allows military practitioners to rely heavily on federal court precedents on particular rules when no military cases are on point. The reverse should be true as well, but in practice, federal court practitioners might be reluctant to cite military precedents. Another benefit of the similarity flows from Military Rule of Evidence 1102 which states that:

Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 180 days after the effective date of such amendments unless action to the contrary is taken by the President.¹⁴⁰

This automatic incorporation of amendments to the Federal Rules of Evidence allows the rules to change quickly, without the need for a cumbersome executive order drafting process, to develop in accord with the rules being used in federal courts generally.¹⁴¹ But it also allows a six-month period in which the military can propose modifications to the President to

¹³⁹ *Id.* (1994 amendment). Specifically, the military version omits the words "in a criminal case," which is logical since that is the only kind of case the military tries under its rules, and it changes the word "court" to "military judge."

¹⁴⁰ MCM, *supra* note 131, MIL. R. EVID. 1102.

¹⁴¹ See SALTZBURG ET AL., *supra* note 129, at 933.

adapt the changes to the needs of military practice.¹⁴² This automatic incorporation procedure was the avenue by which new Federal Rules of Evidence 413 and 414 became a part of the Military Rules of Evidence in January of 1996.¹⁴³

III. Judicial Treatment of Federal Rule of Evidence 404(b).

A. Michelson Gives Way to Huddleston.

Despite the fact that some federal courts continued to apply an exclusionary approach to uncharged misconduct evidence even after Federal Rule of Evidence 404(b) became law,¹⁴⁴ the Supreme Court settled the issue in the 1988 case of *Huddleston v. United States*.¹⁴⁵ Huddleston was accused of knowingly possessing and selling stolen blank Memorex videotapes.¹⁴⁶ The only material issue at trial was whether or not he knew the tapes were stolen.¹⁴⁷ To prove this knowledge, the government offered uncharged misconduct evidence, under Rule 404(b), of two other acts. The first piece of evidence

¹⁴² MCM, *supra* note 131, MIL. R. EVID. 1102 analysis, app. 22.

¹⁴³ See *infra* text accompanying notes 380-81.

¹⁴⁴ See *supra*, text accompanying notes 124-27.

¹⁴⁵ 485 U.S. 681 (1988).

¹⁴⁶ *Id.* at 682.

¹⁴⁷ *Id.* at 683.

was that, two months prior to selling the videotapes, Huddleston had offered to sell a large quantity of television sets at a very low price. He admitted at trial that the television sets came from the same person that had provided the videotapes, and he was unable to produce a bill of sale.¹⁴⁸ The second piece of evidence was that, one month after selling the videotapes, he had offered to sell a large quantity of Amana appliances to an undercover FBI agent for well below their market value. The person Huddleston later identified as the source of the televisions, videotapes and appliances, was also the person who was driving the truck with the Amana appliances when the two of them were arrested for that transaction.¹⁴⁹

One panel of the Court of Appeals for the Sixth Circuit initially reversed Huddleston's conviction for possessing the videotapes because the government had not proven the uncharged misconduct by clear and convincing evidence.¹⁵⁰ On rehearing, a different panel affirmed the conviction, holding that the appropriate standard of proof for the other acts was a preponderance of the evidence standard.¹⁵¹ Huddleston appealed, claiming that the trial court had failed to make a

¹⁴⁸ *Id.* at 683-84, 691.

¹⁴⁹ *Id.* at 683-84.

¹⁵⁰ *Id.* at 684.

¹⁵¹ *Id.*

preliminary finding of fact that the acts had occurred prior to admitting the 404(b) evidence.¹⁵² The Supreme Court granted certiorari to decide whether or not such a preliminary finding of fact was required.¹⁵³

Introducing his opinion with the text of Rule 404(b),¹⁵⁴ Chief Justice Rehnquist authored a clear explanation of how the rule is supposed to work. The rule, he said, "generally prohibits ... evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case."¹⁵⁵ So the "threshold inquiry" is whether or not the uncharged misconduct "is probative of a material issue other than character."¹⁵⁶ In analyzing whether or not the judge must make a preliminary finding of fact that the acts occurred, the Chief Justice explained that Article IV of the Federal Rules of Evidence breaks down into three parts.

Rules 401 and 402 establish the broad principle that relevant evidence ... is admissible unless the Rules provide otherwise. Rule 403 allows the trial judge

¹⁵² *Id.* at 686-87.

¹⁵³ *Id.* at 685.

¹⁵⁴ *Id.* at 682.

¹⁵⁵ *Id.* at 685.

¹⁵⁶ *Id.* at 686.

to exclude relevant evidence if, among other things, 'its probative value is substantially outweighed by the danger of unfair prejudice.' Rules 404 through 412 address specific types of evidence that have generated problems. Generally these latter rules do not flatly prohibit the introduction of such evidence but instead limit the purpose for which it may be introduced. Rule 404(b), for example, protects against the introduction of extrinsic act evidence when that evidence is **offered solely to prove character.**¹⁵⁷

The Chief Justice went on to say that Rule 404(b) did not explicitly or implicitly require a preliminary finding of fact, and that evidence offered for a proper non-character purpose is limited only by Rules 402 and 403.¹⁵⁸ Further emphasizing the inclusionary intent of Rule 404(b), the opinion cited examples from its legislative history to show that Congress intended that uncharged misconduct evidence be liberally admitted.¹⁵⁹ Right or wrong, "Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions

¹⁵⁷ *Id.* at 687 (emphasis added).

¹⁵⁸ *Id.* at 687-88.

¹⁵⁹ *Id.* at 688.

would not be placed on the admission of such evidence."¹⁶⁰ Apparently the concerns of Congress were much the same when they debated and enacted the new Federal Rules of Evidence 413 and 414.¹⁶¹

In the final paragraph of the opinion, Chief Justice Rehnquist gave a final bow to the *Michelson* case,¹⁶² the last time a majority Supreme Court opinion cited it,¹⁶³ stating the Court's concern that Rule 404(b) might admit unduly prejudicial evidence.¹⁶⁴ The Court then listed four protections against this danger: the proper purpose requirement of Rule 404(b); the relevancy requirement of Rule 402; the balancing requirement of Rule 403; and the ability to request limiting instructions under Rule 105.¹⁶⁵ While some Courts of Appeals continue to cite *Michelson* for its broad prohibition on propensity evidence, they generally recognize that Rule 404(b) and *Huddleston* mark a new direction in the

¹⁶⁰ *Id.* at 688-89.

¹⁶¹ *See infra* text accompanying notes 354-79.

¹⁶² *Michelson v. United States*, 335 U.S. 469 (1948). *See supra* text accompanying notes 79-90.

¹⁶³ SHEPARD'S UNITED STATES CITATIONS (1994 & Supp. 1996) available in LEXIS, Shepard's Service (search conducted on Feb. 16, 1996).

¹⁶⁴ 485 U.S. at 691.

¹⁶⁵ *Id.* at 691-92.

law of uncharged misconduct evidence.¹⁶⁶ The *Huddleston* opinion clearly extinguished any credible argument that Rule 404(b) embodied an exclusionary approach to this type of evidence. Another subtle, but important, distinction between the two cases is that *Huddleston*, like Rule 404(b), spoke of prohibiting the use of uncharged misconduct to prove "character," not "propensity," as it had previously been called. By distinguishing between the two, the proper purposes for using uncharged misconduct evidence can be more logically explained.¹⁶⁷

B. *Rule 404(b) Constitutional Issues.*

1. *Double Jeopardy*--In the 1990 case of *Dowling v. United States*,¹⁶⁸ the Supreme Court first addressed the question of whether or not any double jeopardy implications would attach to the use of Rule 404(b) evidence of prior acts for which the accused had already been tried. *Dowling* was

¹⁶⁶ See, e.g., *United States v. Powers*, 59 F.3d 1460, 1474 n.1 (4th Cir. 1995), cert. denied, 116 S. Ct. 784 (1996); *United States v. Brawner*, 32 F.3d 602, 604 (D.C. Cir. 1994); *United States v. Jemal*, 26 F.3d 1267, 1272 (3d Cir. 1994); *United States v. Betts*, 16 F.3d 748, 759 (7th Cir. 1994); *United States v. Robertson*, 15 F.3d 862, 877-78 (9th Cir. 1994) (Reinhardt, Cir. J., concurring) (criticizing the widening range of admissible evidence brought about by *Huddleston* and other cases), rev'd on other grounds, 115 S. Ct. 1732 (1995).

¹⁶⁷ See *infra* text accompanying notes 387-98.

¹⁶⁸ 493 U.S. 342 (1990).

charged with robbing a bank in the Virgin Islands wearing a ski mask and carrying a small pistol.¹⁶⁹ Although an eyewitness at the scene of the robbery identified Dowling, the government offered evidence of another alleged robbery two weeks later in which the victim saw a similar ski mask and small pistol and identified Dowling as the robber sporting them.¹⁷⁰ The government argued that the evidence was admissible under Rule 404(b) to prove identity, not only because of the similar mask and gun used, but also because Dowling was working with the same accomplice on both occasions.¹⁷¹ The problem was that Dowling had already been tried and acquitted of the second robbery.¹⁷² The defense argued that the government should be prevented from using the evidence, citing the Supreme Court's incorporation of collateral estoppel principles into the Double Jeopardy Clause in the case of *Ashe v. Swenson*.¹⁷³

Justice White's majority opinion distinguished *Ashe v. Swenson* as a case in which the acquittal had reflected that the jury had determined an ultimate issue adversely to the

¹⁶⁹ *Id.* at 344.

¹⁷⁰ *Id.* at 344-45.

¹⁷¹ *Id.* at 345.

¹⁷² *Id.*

¹⁷³ 493 U.S. at 347-48 (citing *Ashe v. Swenson*, 397 U.S. 436 (1970)).

government.¹⁷⁴ On the contrary, the Court saw many reasons why the jury might have acquitted Dowling of the second robbery without necessarily disbelieving the identification testimony.¹⁷⁵ But more importantly, the Court pointed out that an acquittal of a crime is not the same as a finding of innocence.¹⁷⁶ It merely means that the jury did not conclude that the defendant was guilty **beyond a reasonable doubt**. *Huddleston*¹⁷⁷ established that Rule 404(b) only requires the government to offer evidence from which the jury can reasonably conclude that the prior act occurred¹⁷⁸ - a preponderance of the evidence standard.¹⁷⁹ So the fact that a prior jury might have found reasonable doubt did not collaterally estop the use of the evidence in a later proceeding with a lower standard of proof.¹⁸⁰

Dowling was a case in which the acts previously tried were completely unrelated to the charged acts. Later in the

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 351-52.

¹⁷⁶ *Id.* at 348-49.

¹⁷⁷ *Huddleston v. United States*, 485 U.S. 681 (1988).
See *supra* text accompanying notes 145-67.

¹⁷⁸ 493 U.S. at 348 (citing 485 U.S. at 689).

¹⁷⁹ 485 U.S. at 690.

¹⁸⁰ 493 U.S. at 348-49.

same 1990 term, the case of *Grady v. Corbin*¹⁸¹ clouded the relationship between Rule 404(b) and the Double Jeopardy Clause in cases where the same conduct is the basis of both trials. Corbin had been drinking and driving and crashed his car into two oncoming vehicles, killing one person and seriously injuring another.¹⁸² Corbin received misdemeanor traffic tickets for driving while intoxicated and failing to keep to the right of the median.¹⁸³ The District Attorney's office began preparing for a homicide prosecution three days later.¹⁸⁴ Unfortunately for the government, the Assistant District Attorneys that handled the routine traffic tickets never spoke to those handling the homicide prosecution and did not know about the injuries.¹⁸⁵ Corbin pled guilty on the misdemeanors and received a sentence including a fine and a six-month license revocation.¹⁸⁶ When the government went forward on the homicide and assault charges, Corbin moved to dismiss on double jeopardy grounds.¹⁸⁷ The New York Court of Appeals reversed the trial court's denial of the motion and

¹⁸¹ 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 509 U.S. 688 (1993).

¹⁸² *Id.* at 511.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 511-13.

¹⁸⁶ *Id.* at 512-13.

¹⁸⁷ *Id.* at 514.

the State petitioned the Supreme Court for a writ of certiorari.¹⁸⁸

Holding that the second prosecution was barred, Justice Brennan's majority opinion apparently expanded the protection of the Double Jeopardy Clause. The clause itself says "nor shall any person be subject for the **same offence** to be twice put in jeopardy of life or limb."¹⁸⁹ The "same offence" language had previously been interpreted as invoking the "same elements" test of *Blockburger v. United States*,¹⁹⁰ with limited exceptions.¹⁹¹ Justice Brennan's opinion stated the new rule that double jeopardy would attach if "to establish an essential element of an offense charged in [a later] prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted."¹⁹²

¹⁸⁸ *Id.* at 508.

¹⁸⁹ U.S. CONST. amend. V (emphasis added).

¹⁹⁰ 495 U.S. at 510 (citing *Blockburger v. United States*, 284 U.S. 299 (1932)).

¹⁹¹ Justice Scalia, in dissent, described two limited situations allowing departure from the *Blockburger* test: 1) where one statutory offense incorporates another statutory offense by reference, but does not list the elements of the incorporated offense; and 2) where collateral estoppel applies, as discussed *supra* at text accompanying notes 173-75. 495 U.S. at 528 (Scalia, J., dissenting).

¹⁹² 495 U.S. at 510. Very similar language also appears later in the opinion. *Id.* at 521.

As appealing as this language may seem in the context of an accused being tried twice for the same conduct, Justice O'Connor's dissent aptly pointed out that this rule could vitiate Rule 404(b) in cases where the uncharged misconduct had been previously prosecuted.¹⁹³ The majority claimed not to have adopted a "same evidence" test that would prevent the government from using any evidence that had been introduced in a previous prosecution.¹⁹⁴ Instead, they merely extended double jeopardy protection to cases in which the government had to or chose to prove the previously prosecuted conduct **as an element of the offense** prosecuted in the later case.¹⁹⁵ Nevertheless, the broad holding of the Court could easily be misread to exclude otherwise admissible uncharged misconduct evidence in later cases where double jeopardy would not apply.

Fortunately for those confused by this apparent conflict, the Court clarified the issue in *United States v. Felix*.¹⁹⁶ Felix was engaged in an ongoing enterprise manufacturing drugs.¹⁹⁷ The Drug Enforcement Agency (DEA) had raided an Oklahoma drug lab he had been operating, so he moved to

¹⁹³ *Id.* at 526 (O'Connor, J., dissenting).

¹⁹⁴ 495 U.S. at 521-22 & n.12.

¹⁹⁵ *Id.* at 521-23.

¹⁹⁶ 503 U.S. 378 (1992). *See also* *United States v. Dixon*, 509 U.S. 688 (1993) (explicitly overruling *Grady*).

¹⁹⁷ *Id.* at 380.

Missouri and attempted to acquire precursor chemicals and equipment to set up a lab there.¹⁹⁸ DEA agents found out about this and arrested him in Missouri.¹⁹⁹ In a federal trial for the attempted manufacture in Missouri, prosecutors introduced evidence of his activities in Oklahoma, under Rule 404(b), to prove criminal intent.²⁰⁰ After this conviction, federal prosecutors in Oklahoma later charged Felix with seven counts of drug offenses committed in Oklahoma.²⁰¹ Of the seven charges, evidence of five of them had been admitted at the Missouri trial under Rule 404(b).²⁰² Relying on *Grady v. Corbin*,²⁰³ the Court of Appeals reversed the convictions on the five charges that duplicated the evidence used in the Missouri trial.²⁰⁴ Because direct evidence to prove these charges had been introduced at the Missouri trial, the Court of Appeals concluded that the Oklahoma trial "subjected Felix to a

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 381.

²⁰¹ *Id.* at 382. Felix was also charged with a count of conspiracy in which two of the nine alleged overt acts were the acts he had been prosecuted for in Missouri. This raised a more difficult double jeopardy question in light of *Grady v. Corbin*, *supra*, but a question I will not deal with here because it was unrelated to Rule 404(b).

²⁰² 503 U.S. at 382-84.

²⁰³ 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 509 U.S. 688 (1993). See *supra* text accompanying notes 181-95.

²⁰⁴ 503 U.S. at 383. The Court of Appeals also reversed the conspiracy conviction. See *supra* note 201.

successive trial for the same conduct."²⁰⁵

Chief Justice Rehnquist, writing for a unanimous Court,²⁰⁶ clarified the relationship between Rule 404(b) and the Double Jeopardy Clause once and for all. Pointing out that the five charges in question were for Oklahoma conduct that had not been charged in the Missouri trial, the Chief Justice explained that the mere fact that evidence of the acts had been introduced under Rule 404(b) did not constitute a prosecution for that conduct.²⁰⁷ The opinion went on to highlight the passage from *Grady v. Corbin*²⁰⁸ where the Court had disclaimed the adoption of a "same evidence" test, and to state that "a mere overlap in proof ... does not establish a double jeopardy violation."²⁰⁹ Finally, the Court noted that they never would have reached the collateral estoppel issue in *Dowling*²¹⁰ if merely admitting evidence under Rule 404(b) had constituted a second prosecution for the prior- acquitted

²⁰⁵ 503 U.S. at 384 (quoting 926 F.2d at 1530-31).

²⁰⁶ *Id.* at 379. Justices Stevens and Blackmun did not join in the portion of the opinion on the conspiracy charge not dealt with here, but they did join with the other seven justices in the portion dealing with the Rule 404(b) issue.

²⁰⁷ *Id.* at 385-86.

²⁰⁸ 495 U.S. 508 (1990), overruled by *United States v. Dixon*, 509 U.S. 688 (1993). See *supra* text accompanying notes 181-95.

²⁰⁹ 503 U.S. at 386.

²¹⁰ *Dowling v. United States*, 493 U.S. 342 (1990). See *supra* text accompanying notes 168-80.

offense.²¹¹ *Felix* clearly established that presenting evidence of other acts under Rule 404(b), either before or after prosecution for the acts, generally does not carry any double jeopardy consequences.

2. *Due Process*--Another constitutional question is whether or not presenting evidence of an accused's uncharged acts somehow violates "fundamental fairness" as embodied in the Due Process Clause. The Court briefly dealt with this issue in *Dowling v. United States*.²¹² Recognizing that the introduction of Dowling's prior-acquitted acts carried "the potential to prejudice the jury," the Court reasoned that the protections within the Federal Rules of Evidence, especially the use of limiting instructions, were ample to prevent abuse.²¹³ Justice White's opinion demonstrated a reluctance to find a Due Process violation in a long-standing rule of evidence:

Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate "fundamental fairness"

²¹¹ 503 U.S. at 386-87.

²¹² 493 U.S. 342 (1990). See *supra* text accompanying notes 168-80.

²¹³ *Id.* at 352-53.

very narrowly.... Especially in light of the limiting instructions provided by the trial judge, we cannot hold that the introduction of [the prior-acquitted acts] testimony merits this kind of condemnation.²¹⁴

Of all the cases in which the government might use uncharged misconduct evidence against an accused, this case would have been one of the most likely to draw due process objections, because of the prior acquittal on the charges arising from the acts. But the Court refused to use the Due Process Clause to protect against this use, finding that the Double Jeopardy Clause²¹⁵ amply protects the accused against multiple trials for the same offense.²¹⁶ At least where Rule 404(b) evidence is offered for a proper non-character purpose, its use does not violate due process.

But what about using uncharged misconduct evidence to prove character or propensity, as is possible under new Federal Rules of Evidence 413 and 414? This issue has yet to be resolved. In the 1991 case of *Estelle v. McGuire*,²¹⁷ the Court specifically declined to decide just this question.

²¹⁴ *Id.*

²¹⁵ See *supra* text accompanying notes 168-211.

²¹⁶ 493 U.S. at 354.

²¹⁷ 502 U.S. 62 (1991).

McGuire was convicted in California state court for murdering his infant daughter.²¹⁸ At trial, the government introduced evidence that the autopsy had revealed prior injuries in various stages of healing, showing a long-term pattern of abuse.²¹⁹ Instructing the jury on how to use this evidence, the trial court said that it:

was received and may be considered by you only for the limited purpose of determining if it tends to show ... a clear connection between the other two offense[s] and the one of which the Defendant is accused, so that it may be logically concluded that if the Defendant committed other offenses, he also committed the crime charged in this case.²²⁰

After exhausting state appeals, the defense sought habeas corpus relief in the federal courts, arguing, among other things, that this was a propensity instruction and therefore violated the "fundamental fairness" standard of the Due Process Clause.²²¹ According to the defense, this instruction essentially told the jury that they could convict based solely

²¹⁸ *Id.* at 64.

²¹⁹ *Id.* at 65.

²²⁰ *Id.* at 71 (quoting App. 41). See also *Id.* at 67 n.1 (quoting the more complete version of the instruction).

²²¹ *Id.* at 64, 71.

on the fact that the defendant had committed other offenses in the past and hence had a propensity to commit this type of crime.²²²

Chief Justice Rehnquist, writing for the majority, rejected this interpretation of the instruction. He placed emphasis on the "clear connection" language to show that the jury more likely would have interpreted the instruction to mean they could only consider the prior acts if they were connected to the charged act in some way.²²³ This, he said, was akin to the use of prior acts evidence under Federal Rule of Evidence 404(b) to show intent, identity, motive, or plan.²²⁴ The Chief Justice also pointed out that the trial judge gave a limiting instruction that the jury could not use the prior acts evidence to infer the defendant's bad character or disposition to commit crimes.²²⁵

Having found that the instruction in question was not a propensity instruction, the Court did not reach the constitutionality of using propensity evidence. But the opinion specifically left the issue open, stating in a footnote: "Because we need not reach the issue, we express no

²²² *Id.* at 74.

²²³ *Id.* at 75.

²²⁴ *Id.*

²²⁵ *Id.*

opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime."²²⁶ This issue may soon be raised in the context of a challenge to Federal Rule of Evidence 413 or 414.

IV. Judicial Treatment of Military Rule of Evidence 404(b).

A. *Pre-Military Rules of Evidence Practice.*

Before the Military Rules of Evidence became effective in 1980, military courts practiced under the rules of evidence promulgated in the 1969 *Manual for Courts-Martial*.²²⁷

Paragraph 138g of those rules contained an uncharged misconduct provision similar in many ways to the new Rule 404(b).²²⁸ Consequently, when the new rules came into effect, many courts and practitioners simply applied the same case law precedents already decided under the old rule. Probably the best illustration of the way the old rule was applied is the case of *United States v. Janis*.²²⁹

²²⁶ *Id.* at 75 n.5.

²²⁷ 1969 MANUAL, *supra* note 128. See *supra* text accompanying notes 128-36.

²²⁸ 1969 MANUAL, *supra* note 128 ¶ 138g. See *supra* text accompanying notes 128-36.

²²⁹ 1 M.J. 395 (C.M.A. 1976).

Sergeant Janis was accused of murdering his infant son by squeezing his head violently. To prove criminal intent, the government introduced evidence of the death, three years before and under similar circumstances, of another infant son of Janis.²³⁰ In upholding the trial judge's decision to admit the uncharged misconduct evidence, the Court of Military Appeals²³¹ reviewed the rules in this area.

First the court restated the general rule that uncharged misconduct evidence was inadmissible because the ordinary use of such evidence would be to show criminal disposition.²³² But, the court noted, there were "seven exceptions to the general rule,"²³³ one of which was to show "knowledge or guilty

²³⁰ *Id.* at 396.

²³¹ The United States Court of Military Appeals is now called the United States Court of Appeals for the Armed Forces, but at the time most of the cases discussed in this thesis were decided, the old name was still in place. See *supra* note 8.

²³² 1 M.J. at 396.

²³³ This formulation sounds like an exclusionary approach to the rule with a "closed" list of exceptions, contrary to the apparent language of the rule itself. See *supra* text accompanying notes 130-33. But as early as 1954, the Court of Military Appeals had addressed the debate between inclusionary and exclusionary approaches and determined that the military rule most likely embodied the former. See *United States v. Haimson*, 5 C.M.A. 208, 226-27 n.4, 17 C.M.R. 208, 226-27 n.4 (1954). The court has reaffirmed this analysis on more than one occasion. See, e.g., *United States v. Stokes*, 12 M.J. 229, 238-39 (C.M.A. 1982) (pre-Military Rules of Evidence); *United States v. Thomas*, 11 M.J. 388, 393 (C.M.A. 1981) (pre-Military Rules of Evidence).

intent."²³⁴ Satisfied that the circumstances surrounding the death of the other son were relevant to the intent issue, the court then listed three other prerequisites to admission for evidence falling within an exception.²³⁵ These were: 1) "a nexus in time, place, and circumstance between the offense charged and the uncharged misconduct;" 2) "plain, clear, and conclusive" evidence of the uncharged misconduct; and 3) a determination that the evidence's potential prejudicial impact did not "far outweigh" its probative value.²³⁶

The court described the nexus required as being a "reasonably close connection in point of time as well as a 'definite relationship to one of the elements of the offense charged,' "²³⁷ which in this case was satisfied by the substantial similarity between the two deaths.²³⁸ The three-year time interval did not strike the court as being too remote.²³⁹ The court drew the standard of proof required from other federal cases,²⁴⁰ all of this pre-dating the *Huddleston*

²³⁴ 1 M.J. at 396-97.

²³⁵ *Id.* at 397.

²³⁶ *Id.*

²³⁷ *Id.* at 397 (quoting *United States v. Kelley*, 23 C.M.R. 48, 53 (C.M.A. 1957)).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* (citing *Kraft v. United States*, 238 F.2d 794, 802 (8th Cir. 1956)). See also *United States v. Myers*, 550

decision.²⁴¹ The similarity of the final balancing requirement to a Federal Rule of Evidence 403 balancing was no coincidence; the court cited the Federal Rule in its opinion, even though the military version of that rule was still four years away.²⁴²

B. Applying the Military Rules of Evidence.

The three-part *Janis* test was the state of the law when the new Military Rules of Evidence came along in 1980. Most of the initial appellate cases addressing Rule 404(b) simply applied the *Janis* test as if the law had not changed, often citing the Drafter's Analysis accompanying the new rule for the proposition that Rule 404(b) had made no substantial change in the law.²⁴³ Not until 1984 did the Court of Military Appeals begin to make a slow break from *Janis* in the case of

F.2d 1036, 1044 (5th Cir. 1977) (describing a list of prerequisites very similar to the scheme laid out in *Janis*), *cert. denied*, 439 U.S. 847 (1978).

²⁴¹ See *supra* text accompanying notes 145-67.

²⁴² 1 M.J. at 397. See *supra* text accompanying notes 134-36.

²⁴³ See, e.g., *United States v. Vilches*, 17 M.J. 851 (N.M.C.M.R. 1984); *United States v. Williams*, 17 M.J. 548 (A.C.M.R. 1983); *United States v. Lambert*, 17 M.J. 600 (N.M.C.M.R. 1983); *United States v. Hancock*, 14 M.J. 998 (A.C.M.R. 1982); *United States v. DiCupe*, 14 M.J. 915 (A.F.C.M.R. 1982), *aff'd*, 21 M.J. 440 (C.M.A.), *cert. denied*, 479 U.S. 826 (1986).

Brannan was convicted of drug offenses despite his denials and his claim that he had been framed.²⁴⁵ The government had introduced evidence of prior similar drug offenses, ostensibly to show a common scheme or plan or to show a modus operandi.²⁴⁶ In evaluating the admissibility of this evidence, Judge Fletcher, writing for the court, acknowledged that *Janis* had involved a similar issue.²⁴⁷ But he went on to hint that *Janis* might no longer be appropriate precedent, stating that "[t]oday, our review of this question is more particularly guided by Mil.R.Evid. 404(b) and 403."²⁴⁸ Without explicitly rejecting the *Janis* analysis, Judge Fletcher adopted a different three-step process. First, "identify the evidence ... that tended to show that appellant had engaged in other offenses."²⁴⁹ Second, "identify the particular purposes" for offering the evidence under Rule

²⁴⁴ 18 M.J. 181 (C.M.A. 1984). This appears to have been the first opportunity the Court of Military Appeals had to address the issue in a case tried under the new rule, due to the time lag in the appellate process.

²⁴⁵ *Id.* at 181-82.

²⁴⁶ *Id.* at 183.

²⁴⁷ *Id.* at 182.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

404(b).²⁵⁰ And third, apply a Rule 403 balancing to ensure that the danger of "undue" prejudice did not substantially outweigh the probative value of the evidence.²⁵¹ The court ultimately rejected the government's claimed purposes for offering the evidence, but found the evidence was admissible to rebut Brannan's denial of criminal intent.²⁵²

While *Brannan* appeared to make a break from *Janis*, the break was not a clean one. In the 1986 case of *United States v. DiCupe*,²⁵³ the Court of Military Appeals quoted verbatim the lower court's restatement of the *Janis* test without comment, implying that the test was still valid.²⁵⁴ But later the same year, in *United States v. Brooks*,²⁵⁵ the court took another step toward discarding *Janis*.

Brooks, like *Brannan*, had been convicted of drug offenses, including a distribution charge.²⁵⁶ A defense witness testified that he had sold the drugs alone and that

²⁵⁰ *Id.* at 183.

²⁵¹ *Id.* at 185.

²⁵² *Id.* at 184-85.

²⁵³ 21 M.J. 440 (C.M.A.), *cert. denied*, 479 U.S. 826 (1986).

²⁵⁴ *Id.* at 443-44 (quoting *United States v. Dicupe*, 14 M.J. 915, 917 (A.F.C.M.R. 1982)).

²⁵⁵ 22 M.J. 441 (C.M.A. 1986).

²⁵⁶ *Id.* at 442.

Brooks was an innocent bystander.²⁵⁷ The government unsuccessfully attempted to elicit from this witness that Brooks had participated in prior drug transactions with him, to rebut this claimed lack of intent.²⁵⁸ In a two-judge opinion, Judge Cox analyzed the propriety of the trial counsel's questions in terms of whether or not the evidence would have been admissible if it had been elicited.²⁵⁹ He explained that prior to Rule 404(b), the *Janis* test had "strictly limited" the use of uncharged misconduct evidence.²⁶⁰ But citing *Brannan*, he stated that "[s]ince September 1, 1980, the admission of such evidence has been governed by [Rule] 404(b)."²⁶¹ He went on to compare the similarities between the new and old rules in their "proper purpose" requirement and in

²⁵⁷ *Id.* at 443.

²⁵⁸ *Id.* The trial counsel argued the usual "common plan or scheme" and "signature" purposes for eliciting the prior act evidence, apparently feeling constrained to pigeon-hole the evidence into an established category.

²⁵⁹ *Id.* at 443-44.

²⁶⁰ *Id.* at 444. The opinion restated the three prerequisites of the *Janis* test. Although not critical to the case, the third element was stated differently than in *Janis*. Here the court stated the government must show "that the probative value of the evidence far outweighed the potential prejudicial impact." *Id.* In *Janis* the court stated the issue was "whether the integrity and fairness of the trial process dictates that the evidence be excluded because **its potential prejudicial impact far outweighs its probative value.**" *United States v. Janis*, 1 M.J. 395, 397 (C.M.A. 1976) (emphasis added). So the actual *Janis* test is not as strict as the restatement in *Brooks* makes it appear.

²⁶¹ 22 M.J. at 444 (citing *United States v. Brannan*, 18 M.J. 181 (C.M.A. 1984)).

the need to weigh the danger of unfair prejudice against probative value.²⁶² But he implied - though he never specifically stated - that instead of a strict "nexus" requirement, the new rule imposed only a "relevance to a proper purpose" requirement.²⁶³ The court held that the evidence in this case met the tests imposed by Rules 404(b) and 403.²⁶⁴

C. *Refining the Standard of Proof.*

Although *Brooks* strongly implied that the use of uncharged misconduct evidence was not as "strictly limited" under Rule 404(b) as it had been under *Janis*,²⁶⁵ the court did not address the standard of proof required to admit the evidence. *Janis* had explicitly held that the uncharged acts must be proven by "plain, clear, and conclusive" evidence.²⁶⁶ In *United States v. White*,²⁶⁷ decided a month after *Brooks*, the court provided mixed signals on this question.

White, like Janis, was convicted for killing his young

²⁶² 22 M.J. at 444.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ See *supra* text accompanying notes 256-64.

²⁶⁶ See *supra* text accompanying notes 235-36.

²⁶⁷ 23 M.J. 84 (C.M.A. 1986).

son by violent handling.²⁶⁸ The government introduced evidence of the child's prior injuries, some older and some newer, to prove "battered child syndrome."²⁶⁹ Through expert testimony, the government established that this tended to show the injuries were not accidental.²⁷⁰ The defense had argued the evidence was irrelevant, since the government had failed to prove the accused inflicted the prior injuries.²⁷¹

In assessing the admissibility of the prior injury evidence under Rule 404(b), Judge Cox adopted a "three-step analysis" very similar to the one Judge Fletcher had applied

²⁶⁸ *Id.* at 85.

²⁶⁹ *Id.* at 86. The expert witness defined "battered child syndrome" as "a clinical condition in young children, usually below the age of three, who receive nonaccidental multiple and sometimes generalized injuries to the body." *Id.* The court offered another definition:

The diagnosis ... is dependent on inferences, not a matter of common knowledge, but within the area of expertise of physicians whose familiarity with numerous instances of injuries accidentally caused qualifies them to express with reasonable probability that a particular injury or group of injuries to a child *is not accidental or is not consistent with the explanation offered therefor but is instead the result of physical abuse by a person of mature strength.*

Id. at 87 (alteration in original) (quoting *State v. Tanner*, 675 P.2d 539, 542 (Utah 1983) (quoting *State v. Mulder*, 629 P.2d 462, 463 (Wash. Ct. App. 1981))).

²⁷⁰ *Id.* at 86. See *supra* note 269.

²⁷¹ 23 M.J. at 86.

in *Brannan*.²⁷² The first question he said the judge must ask as is: "does the evidence tend to prove that the accused committed prior crimes, wrongs, or acts?"²⁷³ The words "tend to prove" do not suggest an especially high standard of proof. On the contrary, they imply a preponderance standard. But in applying this test to the instant case, the court stated that the evidence "**clearly** established that prior ... acts were committed by someone," and later, "that the circumstantial evidence **clearly** supports a finding that appellant, not someone else, battered the child on previous occasions."²⁷⁴ While not holding that uncharged misconduct had to be proven "clearly," the court did not "clearly" reject the higher standard of proof either, thus leaving this issue unresolved for another two years.

In *United States v. Mirandes-Gonzalez*,²⁷⁵ the standard of proof issue stood squarely before the court. This was another child abuse case, in which the government introduced evidence of a prior injury to rebut the defense of accident.²⁷⁶ The defense argued the evidence was inadmissible because the

²⁷² *Id.* at 86-87. See *supra* text accompanying notes 244-52.

²⁷³ 23 M.J. at 86-87.

²⁷⁴ *Id.* at 87.

²⁷⁵ 26 M.J. 411 (C.M.A. 1988).

²⁷⁶ *Id.* at 412.

government failed to prove "by clear and convincing evidence" that the accused had inflicted the prior injury.²⁷⁷ Judge Cox, again writing for the court, took this opportunity to resolve any ambiguity that *White* had allowed to remain.²⁷⁸ Citing the recent Supreme Court decision of *Huddleston v. United States*,²⁷⁹ the court rejected, once and for all, any elevated standard of proof for uncharged misconduct evidence offered under Rule 404(b). The question, said the court, was "whether there is sufficient evidence for a reasonable court member to believe that the accused in fact committed the extrinsic offense."²⁸⁰ Applying this test to the instant case, the court held that "the circumstantial evidence supports an inference that appellant injured the child on that occasion."²⁸¹ This time the word "clearly" was conspicuous by its absence.

In a brief concurring opinion, Judge Sullivan pointed out that the Supreme Court in *Huddleston* had "expressly recognized ... 'that the strength of the evidence establishing the similar act is one of the factors the court may consider when

²⁷⁷ *Id.* at 413.

²⁷⁸ *See supra* text accompanying notes 267-74.

²⁷⁹ 485 U.S. 681 (1988). *See supra* text accompanying notes 145-67.

²⁸⁰ 26 M.J. at 414.

²⁸¹ *Id.*

conducting the Rule 403 balancing.' "²⁸² The court again highlighted this shifting of emphasis from the Rule 404(b) test to the Rule 403 test in *United States v. Castillo*.²⁸³ Speaking of the Rule 403 balancing test as the final step in the uncharged misconduct analysis, Chief Judge Everett wrote:

The need for this evaluation is enhanced because now a very low threshold exists as to admissibility of evidence of other misconduct. No longer is it required that such evidence be "clear and convincing" as was once the case. [citing *Janis*²⁸⁴] Instead, now the military judge must admit the evidence if he concludes that the fact-finder could reasonably find by a preponderance of the evidence that the other misconduct had occurred, even though the judge himself would not make such a finding. [citing *Mirandes-Gonzalez*²⁸⁵ and *Huddleston*²⁸⁶]²⁸⁷

²⁸² *Id.* (Sullivan, J., concurring) (quoting *Huddleston v. United States*, 485 U.S. 681, 689 n.6 (1988)).

²⁸³ 29 M.J. 145 (C.M.A. 1989).

²⁸⁴ See *supra* text accompanying notes 229-42.

²⁸⁵ See *supra* text accompanying notes 275-82.

²⁸⁶ See *supra* text accompanying notes 145-67.

²⁸⁷ 29 M.J. at 151.

D. *What Happened to Nexus?*

In *Brooks*, Judge Cox implied that the *Janis* requirement of "nexus in time, place, and circumstance between the offense charged and the uncharged misconduct" had been superseded by a "relevance to a proper purpose" test in the Military Rules of Evidence.²⁸⁸ In the 1989 case of *United States v. Ferguson*,²⁸⁹ the court confirmed this analysis, but in applying a "relevance" test, illustrated that it might not be much different from a "nexus" test. Ferguson was convicted of child sexual abuse of one of his two step-daughters.²⁹⁰ At trial, the victim testified briefly about uncharged prior similar acts and the other step-daughter testified about Ferguson's prior similar acts with her.²⁹¹ The government argued the uncharged misconduct was admissible under Rule 404(b) to prove modus operandi, plan, and specific intent.²⁹² The military judge allowed the testimony and, after vacillating on the proper purpose for the evidence, instructed the members it could only be considered on the issue of modus operandi.²⁹³ But the key similarities that would have

²⁸⁸ See *supra* text accompanying notes 255-64.

²⁸⁹ 28 M.J. 104 (C.M.A. 1989).

²⁹⁰ *Id.* at 105.

²⁹¹ *Id.* 105-06.

²⁹² *Id.*

²⁹³ *Id.* at 106-07.

indicated a modus operandi were really between the uncharged acts with both step-daughters and were not alleged as part of the charged acts.²⁹⁴

Chief Judge Everett, writing for the court, approached this confused state of the evidence with a simple question: "What was the relevance of this evidence of uncharged misconduct?"²⁹⁵ Citing Military Rules of Evidence 401 and 402, as well as 404(b), the Chief Judge analyzed the interplay between them. He concluded that:

[Rule] 404(b) clarifies that evidence of past wrongdoing is not "relevant" to show in a general sense that, "if he did it before, he probably did it again." ... [S]uch evidence of uncharged misconduct "may ... be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." This list is illustrative, not exhaustive; but the point it manifestly makes is that this kind of evidence, to be **relevant**, must **directly relate** to some specific "fact that is of consequence to the ... action," not to the general

²⁹⁴ *Id.* at 107-08.

²⁹⁵ *Id.* at 108.

issue of criminality.²⁹⁶

The military judge had only allowed the members to use the uncharged misconduct on the issue of *modus operandi*. Chief Judge Everett pointed out that *modus operandi* was relevant only to prove identity, which was not at issue in the case. Hence the evidence was not relevant.²⁹⁷ Anticipating other potential arguments for admissibility, he went on to say that this evidence lacked "close parallels" with the charged acts,²⁹⁸ hinting that some kind of "nexus" may be required to show relevance. Perhaps the best conclusion to draw from *Ferguson* is that a strict "nexus in time, place, and circumstances" is not required, but because relevance requires a logical link, some kind of "nexus in time, place or circumstances" is required.

Confirming that *Ferguson* had correctly placed the emphasis on relevance, the court crystallized the three-step test for uncharged misconduct evidence in *United States v. Reynolds*.²⁹⁹ The first step was the standard of proof: evidence reasonably supporting a finding (by a preponderance

²⁹⁶ *Id.* (emphasis added).

²⁹⁷ *Id.* at 109.

²⁹⁸ *Id.* at 108-09 (quoting *United States v. Cuellar*, 27 M.J. 50, 53 (C.M.A. 1988), *cert. denied*, 493 U.S. 811 (1989)).

²⁹⁹ 29 M.J. 105, 109 (C.M.A. 1989).

of the evidence) that the accused did the acts.³⁰⁰ The second step was the relevance issue: a fact at issue (other than general criminality) had to be made more or less probable.³⁰¹ And the third step was the Rule 403 balancing: the danger of unfair prejudice could not substantially outweigh the probative value of the evidence.³⁰² This test has become the standard for analyzing uncharged misconduct evidence under the Military Rules of Evidence.³⁰³ Even though the "nexus" requirement is conspicuously absent, the court has continued to speak of "nexus" in later cases, often in terms of whether or not prior acts are linked to the charged acts in such a way as to be relevant.³⁰⁴ But in the court's latest discussion of the *Janis* "nexus" requirement, it incorporated the analysis into the Rule 403 balancing component of the test, not into

³⁰⁰ *Id.* (citing *United States v. Mirandes-Gonzalez*, 26 M.J. 411 (C.M.A. 1988)). See *supra* text accompanying notes 275-82. Note that the military judge need not make a preliminary finding that the evidence meets this standard. See *supra* text accompanying notes 145-67.

³⁰¹ 29 M.J. at 109 (citing *United States v. Ferguson*, 28 M.J. 104, 108 (C.M.A. 1989)). See *supra* text accompanying notes 289-98.

³⁰² 29 M.J. at 109 (citing *MANUAL FOR COURTS-MARTIAL, United States*, MIL. R. EVID. 403 (1984); *STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL* 362 (2d ed. 1986 & Supp. 1988)).

³⁰³ See, e.g., *United States v. Dorsey*, 38 M.J. 244, 246 (C.M.A. 1993); *United States v. Rushatz*, 31 M.J. 450, 457 (C.M.A. 1990).

³⁰⁴ See, e.g., *United States v. Rushatz*, 31 M.J. 450, 457 (C.M.A. 1990) ("sufficient nexus ... to make the ... testimony relevant...").

the relevance component.³⁰⁵

E. The Teeth Shift From Rule 404(b) to Rule 403.

Judge Sullivan's concurring opinion in *Mirandes-Gonzalez* and Chief Judge Everett's opinion in *Castillo* noted a shifting of the power to exclude evidence from Rule 404(b) to Rule 403 in the context of the lowered standard of proof for uncharged misconduct evidence.³⁰⁶ Judge Crawford's opinion in *United States v. Metz*³⁰⁷ recognized that the *Janis* "nexus" requirement had migrated from a Rule 404(b) evidence prerequisite to a Rule 403 "key factor."³⁰⁸ This trend shows that Rule 404(b) has become a very narrow rule that excludes very little evidence. If the evidence is irrelevant, Rule 402 excludes it. If the evidence is relevant, but only to prove the character of the accused, then Rule 404(b) excludes it. All other relevant evidence that clears this hurdle flows through to Rule 403, where the final possibility of exclusion resides.

³⁰⁵ *United States v. Metz*, 34 M.J. 349, 352 (C.M.A. 1992) ("A key factor [in the Rule 403 balancing] is whether the 'nexus' between the uncharged misconduct and the crime is close 'in time, place, and circumstance.' [citing *Janis*]").

³⁰⁶ See *supra* text accompanying notes 282-87.

³⁰⁷ 34 M.J. 349, 352 (C.M.A. 1992). See *supra* note 305.

³⁰⁸ 34 M.J. at 352.

The recent case of *United States v. Walker*³⁰⁹ best illustrates the culmination of this trend. A members court-martial convicted Walker of a single specification of cocaine use.³¹⁰ The government had introduced medical records showing that he had received treatment for sinusitis³¹¹ on six occasions prior to and after the alleged cocaine use.³¹² An expert testified that sinus problems would be one possible symptom of chronic cocaine use, but admitted on cross-examination that many other things could cause such problems.³¹³ The government argued that the evidence of prior regular cocaine use was relevant to prove knowing use on the charged occasion, an element of the offense, and to rebut the accused's defense of innocent ingestion.³¹⁴ The military judge admitted this evidence without giving any limiting or cautionary instructions to the members on its use.³¹⁵

Applying the Rule 404(b) admissibility standard, Chief Judge Sullivan, writing for a unanimous court, concluded that

³⁰⁹ 42 M.J. 67 (1995).

³¹⁰ *Id.* at 68.

³¹¹ The expert defined sinusitis as "inflammation ... of the sinuses." *Id.* at 69.

³¹² *Id.* at 68, 70.

³¹³ *Id.* at 69-70.

³¹⁴ *Id.* at 70-71.

³¹⁵ *Id.* at 71, 74.

the evidence met that low standard.³¹⁶ The accused had raised innocent ingestion as a defense, so knowledge and absence of mistake or accident were clearly in issue.³¹⁷ The Chief Judge pointed out that "evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence ... more probable or less probable....'"³¹⁸ The fact that the expert testified that sinusitis can be a symptom of regular drug use made the sinusitis evidence relevant to prove the uncharged misconduct (prior drug use), which was relevant to prove knowing use on the charged occasion.³¹⁹ The fact that the expert had not examined the accused or his medical records only affected the weight to be afforded to the evidence.³²⁰

The court's analysis of the Rule 403 question arrived at a different result, however.³²¹ Analyzing factors that the *Janis* test would have considered under the Rule 404(b) analysis,³²² the Chief Judge concluded that the trial judge had

³¹⁶ *Id.* at 71-73.

³¹⁷ *Id.* at 71-72.

³¹⁸ *Id.* at 73 (quoting MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 401 (1984)).

³¹⁹ *Id.* at 72-73.

³²⁰ *Id.* at 73.

³²¹ *Id.* at 73-74.

³²² See *supra* text accompanying notes 229-42.

abused his discretion under Rule 403.³²³ The fact that so many different causes other than drug use could explain the sinusitis, under *Janis* would have indicated a failure to prove the uncharged misconduct by "plain, clear, and conclusive evidence."³²⁴ Here it indicated the low probative value of the otherwise admissible evidence as it was tossed into the Rule 403 hopper.³²⁵ Likewise for the fact that the expert had not examined the accused personally.³²⁶ The fact that some of the sinusitis evidence was remote in time from the charged offense³²⁷ might have triggered a "nexus" violation under *Janis*,³²⁸ but here it was just another unenumerated factor in the probative value analysis.³²⁹ So while this evidence was

³²³ 42 M.J. at 74.

³²⁴ See *supra* text accompanying notes 235-36.

³²⁵ 42 M.J. at 73.

³²⁶ *Id.* at 74.

³²⁷ *Id.* at 70.

³²⁸ See *supra* text accompanying notes 235-39. Under these circumstances a "nexus" violation would admittedly be unlikely since the uncharged misconduct evidence bracketed the time of the charged offense. 42 M.J. at 70. Also, if the idea is to prove knowledge of cocaine's physical attributes and the symptoms of cocaine use to rebut accidental or unknowing ingestion, the time the knowledge was acquired would not be of great importance as long as it was before the charged knowing use.

³²⁹ A better example of temporal remoteness being addressed as a Rule 403 factor instead of a Rule 404(b) factor is *United States v. Holmes*, 39 M.J. 176 (C.M.A. 1994). In *Holmes*, the court held that an 18-year-old prior drug use was not *per se* inadmissible due to its age. The court ultimately held that, although the evidence might be logically relevant, it failed the test of legal relevance under Rule 403,

relevant and admissible under Rule 404(b), the danger of unfair prejudice substantially outweighed its low probative value, especially in the absence of limiting instructions,³³⁰ making it inadmissible under Rule 403.

Why is the trend toward Rule 403 enforcement important? Because it gives trial and appellate judges much greater flexibility in admitting or excluding evidence. Abandoning the previously restrictive standards for admitting uncharged misconduct evidence in favor of a mere "relevance to a proper purpose" standard allows judges to admit almost any probative evidence of guilt, subject only to Rule 403 limitations. The problem with the Rule 403 restriction is the lack of concrete standards for trial judges to apply.³³¹ How does a trial judge

primarily because of its age. *Id.* But see *United States v. Munoz*, 32 M.J. 359 (C.M.A.) (uncharged misconduct at least 12 years prior to charged acts was not too old, considered as part of the Rule 404(b) analysis), *cert. denied*, 502 U.S. 967 (1991). See *infra* text accompanying notes 337-53.

³³⁰ 42 M.J. at 74.

³³¹ The difficulty of applying the Rule 403 standard is aggravated by the court's own inability to keep the standard straight. In *United States v. Loving*, 41 M.J. 213 (1994), *cert. granted*, 116 S. Ct. 39 (1995), the Court of Appeals for the Armed Forces released the opinion in the advance sheets stating the standard one way and, apparently after receiving inquiry about the changed standard, corrected the opinion in the final version released in the hard-cover reporters. The initial version stated: "the 'probative value' of the evidence must substantially outweigh 'the danger of unfair prejudice' or confusion." *Id.* at 245 (advance sheet). The final version stated: "the 'probative value' of the evidence must not be substantially outweighed by 'the danger of unfair prejudice' or confusion." *Id.* at 245 (hard-cover reporter). Admittedly *Loving* was an extremely lengthy opinion with a whole host of

know if he or she is abusing that discretion? By reading the case law, of course, and attempting to analogize the rules from prior cases as common law judges have been doing for centuries. Probably not a problem in most cases. But this divergence between Rule 404(b) and Rule 403 may have important implications in applying new Military Rules of Evidence 413 and 414.³³²

F. The Special Case of Sex Offenses.

Many commentators have noted that courts tend to be less strict in prohibiting propensity evidence in sex offense cases, particularly when the victims are children.³³³ The Court of Appeals for the Armed Forces³³⁴ has shown this same tendency.³³⁵ Probably the best example of judicial leniency³³⁶

issues and standards to keep straight, but it was a capital case. Interestingly, this change was made without so much as a footnote to alert the reader of the variance.

³³² See *infra* text accompanying notes 399-418.

³³³ See, e.g., IMWINKELRIED, *supra* note 12, §§ 2:22, 4:11-4:18; Reed, *supra* note 103; Stone, *supra* note 103.

³³⁴ Formerly the United States Court of Military Appeals. See *supra* note 8.

³³⁵ See Major Stephen T. Strong, *What is a Plan? Judicial Expansion of the Plan Theory of Military Rule of Evidence 404(b) in Sexual Misconduct Cases*, ARMY LAW., June 1992, at 13.

³³⁶ The term "leniency" here means leniency toward the government, not toward the accused.

in this area was the 1991 case of *United States v. Munoz*.³³⁷

Munoz was charged with four specifications of committing indecent acts on one of his daughters when she was about 10 or 11 years old.³³⁸ To corroborate this victim's testimony by showing a common scheme or plan, the government presented the testimony of her 24-year-old sister, whom Munoz had also sexually abused when she was about the same age.³³⁹ The military judge allowed the testimony, finding it "probative of a plan on the accused's part to sexually abuse his children...."³⁴⁰ The common elements that indicated a plan were: the similarity of acts, the common situs in the home, the similar age of the victims, the fact that other people were often present in the home, and the fact that the accused had often been drinking at the time.³⁴¹

Chief Judge Sullivan, writing the lead opinion for the court, easily found the sister's testimony to be legitimate evidence of a plan. He noted the "significant elements of

³³⁷ 32 M.J. 359 (C.M.A.), *cert. denied*, 502 U.S. 967 (1991).

³³⁸ *Id.* at 360.

³³⁹ *Id.*

³⁴⁰ *Id.* at 361.

³⁴¹ *Id.* The military judge also excluded the testimony of another sister, about a similar incident she had experienced, on Rule 403 grounds. *Id.*

concurrence between the uncharged acts and the charged acts which suggested a common plan."³⁴² Based on those "common factors," the court held the trial judge had not abused his discretion in finding the uncharged misconduct evidence admissible to prove a plan.³⁴³ The Chief Judge easily dismissed the defense argument that the prior acts were too remote in time, having occurred at least 12 years before the charged acts. The critical element was the victim's age at the time, not the time between victims.³⁴⁴ Finally, Chief Judge Sullivan distinguished *Ferguson*,³⁴⁵ where the uncharged misconduct evidence had been offered to prove a fact that was not at issue in the case. Here, he said: "[t]he critical issue ... was the occurrence of the charged indecent acts, and evidence of appellant's plan to do such acts was probative on this point."³⁴⁶

³⁴² *Id.* at 363.

³⁴³ *Id.* at 363-64.

³⁴⁴ *Id.* at 364.

³⁴⁵ *United States v. Ferguson*, 28 M.J. 104 (C.M.A. 1989). See *supra* text accompanying notes 289-98.

³⁴⁶ 32 M.J. at 364. The court also addressed what it termed the "more difficult problem" of the Rule 403 balancing in this case. This was a difficult problem because the victim's sister had testified to more than just the acts similar to the instant charges. Her testimony included accounts of repeated oral and anal sodomy, "clearly more egregious and reprehensible" than the fondling alleged in the charges and referred to in the government's offer of proof as to what the sister would say. *Id.* Although the court found "[a]dmissibility of this testimony under Mil.R.Evid. 403 ... highly questionable," it noted that the defense lack of response to the "simple overkill" suggested waiver of the

Senior Judge Everett, in a highly critical dissent, alleged that the majority "when faced with rules of evidence that require the delicate touch of a surgeon's scalpel ... instead [had] wielded a bludgeon."³⁴⁷ In particular, he failed to see how the accused could have had a plan to molest his yet-unborn daughter at the time he had molested the older daughter.³⁴⁸ This is what would have been required under the common law definition of a common scheme or plan.³⁴⁹

In a forward-looking concurring opinion, Judge Cox suggested an approach to resolve the tension between the majority and dissenting opinions. In effect, he suggested

issue. *Id.* at 364-65. Noting that the military judge had given a carefully-crafted limiting instruction, the court held the "overkill" had not substantially changed the outcome of the trial. *Id.* at 365.

³⁴⁷ *Id.* at 366 (Everett, S.J., dissenting).

³⁴⁸ *Id.* at 367.

³⁴⁹ See Strong, *supra* note 335, at 16-17, 21. Addressing the sodomy evidence, Senior Judge Everett said: "Only if one expands the 'common scheme or plan' concept to one that embraces *all* sexual misconduct by an accused on his children can this evidence of sodomy be deemed within Mil. R. Evid. 404(b)." 32 M.J. at 368. He appears to have foreshadowed quite accurately what new Military Rule of Evidence 414 has done in effect. What these critics of expansive application of the common scheme or plan theory fail to recognize, however, is the existence of a similar but distinct theory known as "system." See, e.g., *Lisenba v. California*, 314 U.S. 219 (1941) (holding constitutional California's adoption of "the widely recognized principle that similar but disconnected acts may be shown to establish intent, design, and system."). Under a system theory, prior similar acts can be relevant to show the existence of a system, even if the prior acts occurred before the current victim was even known to the accused.

that sex offenses are a different breed and that "[e]vidence of similar sexual conduct, particularly deviant sexual conduct such as incest, is powerful circumstantial evidence."³⁵⁰ In a footnote he even expressed doubt that a person's sexuality should be called "character,"³⁵¹ hinting that sexual propensities are more like a physical characteristic, to be proven by past observation of the trait, unrestrained by Rule 404(b). Recognizing the potential dangers inherent in this kind of evidence, he stated that military judges must still apply Rule 403 to protect against unfair prejudice.³⁵² Finally, he noted that the proposed new Federal Rule of Evidence 414 apparently reflected his views of the relevance of an accused's past similar sexual conduct.³⁵³ Unfortunately, only the title of the proposed rule contained the word "similar," and even if a title limits the rule, how narrowly would "similar" be defined?

V. New Federal Rules of Evidence 413 and 414.

Rule 413 (414). Evidence of Similar Crimes in Sexual Assault (Child Molestation) Cases.

³⁵⁰ 32 M.J. at 365 (Cox, J., concurring).

³⁵¹ *Id.* at 365 n.1.

³⁵² *Id.* at 365.

³⁵³ *Id.* at 366 & n.2.

(a) In a criminal case in which the defendant is accused of an offense of sexual assault (child molestation), evidence of the defendant's commission of another offense or offenses of sexual assault (child molestation) is admissible, and may be considered for its bearing on any matter to which it is relevant.³⁵⁴

A. *Origins of the New Rules.*

The proposal for new rules allowing the use of similar acts evidence in sexual assault and child molestation cases arose from a concern that this "typically relevant and probative"³⁵⁵ evidence was being excluded by rules modeled on Federal Rule of Evidence 404(b).³⁵⁶ David J. Karp of the Office of Policy Development, United States Department of

³⁵⁴ FED. R. EVID. 413, 414. The two rules are virtually identical. Substituting the words "child molestation" for the words "sexual assault" in Rule 413(a), yields the text of Rule 414(a). The key evidentiary principle appears in subsection (a) which is reproduced here. The full text of Rules 413-415 appears in Appendix A. Rule 415, Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation, was also part of the package of new rules, but will not be dealt with here because of its inapplicability in criminal cases.

³⁵⁵ 140 CONG. REC. H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari); 140 CONG. REC. S12,990 (daily ed. Sep. 20, 1994) (statement of Sen. Dole).

³⁵⁶ 137 CONG. REC. S3192, S3238-39 (daily ed. Mar. 13, 1991) (analysis statement accompanying rules) (described by Rep. Molinari and Sen. Dole at 140 CONG. REC. H8991, S12,990, as part of the legislative history of the new rules).

Justice, authored the new rules, which were initially proposed in legislation in February of 1991.³⁵⁷ The first legislative attempt to enact Federal Rules of Evidence 413 and 414 was in the Women's Equal Opportunity Act bill, introduced by Representative Susan Molinari of New York and Senator Robert Dole of Kansas.³⁵⁸ Despite initial failure to pass the rules, these sponsors and others continued to reintroduce the proposal as part of the Sexual Assault Prevention Act bills in the 102d and 103d Congresses.³⁵⁹ The new rules were also included in President Bush's proposed Comprehensive Violent Crime Control Acts of 1991 and 1992, as well as in other bills, but each time failed to become law.³⁶⁰ Ultimately these rules were included in the Violent Crime Control and Law Enforcement Act of 1994, which passed and became law in

³⁵⁷ 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari); 140 CONG. REC. S12,990 (daily ed. Sep. 20, 1994) (statement of Sen. Dole); Anne E. Kyl, *The Propriety of Propensity: The Effects and Operation of New Federal Rules of Evidence 413 and 414*, 37 ARIZ. L. REV. 659 (1995). See also David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15 (1994) (described by Rep. Molinari and Sen. Dole, *supra*, as part of the legislative history of the new rules, along with the analysis statement cited *supra* at note 356).

³⁵⁸ 140 CONG. REC. at H8991, S12,990 (statements of Rep. Molinari and Sen. Dole).

³⁵⁹ *Id.*; Karp, *supra* note 357, at 15-16 & n.7.

³⁶⁰ Karp, *supra* note 357, at 15-16 & n.6; 140 CONG. REC. at H8991, S12,990 (statements of Rep. Molinari and Sen. Dole); IMWINKELRIED, *supra* note 12, § 2:22 (Supp. 1995).

September of 1994.³⁶¹

Due to objections that the new rules had by-passed the usual rule-making procedures codified in the Rules Enabling Act,³⁶² the final version of the bill included a delayed effective date to allow for a report and recommendations from the Judicial Conference of the United States.³⁶³ Not later than 150 days after enactment, the Judicial Conference was to provide a report to Congress with recommendations for amending the Federal Rules of Evidence in this area.³⁶⁴ If the Judicial Conference agreed with the Congressional version of the rules, they would be effective 30 days later, but if the Judicial Conference disagreed, they would be effective 150 days later, absent further Congressional action.³⁶⁵ The new rules would then apply in trials beginning on or after that effective date.³⁶⁶

³⁶¹ Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135 (1994). See Karp, *supra* note 357, at 15 n.*; Kyl, *supra* note 357, at 659.

³⁶² 28 U.S.C. §§ 2071-2077 (1994). See, e.g., 140 CONG. REC. H8990 (daily ed. Aug. 21, 1994) (inserted statement of Rep. Hughes).

³⁶³ 108 Stat. at 2137; 140 CONG. REC. at H8991, S12,990 (statements of Rep. Molinari and Sen. Dole).

³⁶⁴ 108 Stat. at 2137 (§ 320935(c)).

³⁶⁵ *Id.* (§ 320935(d)).

³⁶⁶ *Id.* (§ 320935(e)).

The Judicial Conference submitted its report, exactly 150 days after enactment, on February 9, 1995.³⁶⁷ Recommending that Congress reconsider its decision to change the rules at all, the report also provided alternative amendments to Rules 404 and 405, designed to achieve Congressional intent without the "drafting ambiguities" and "possible constitutional infirmities" noted in the new rules.³⁶⁸ More specifically, the report indicated concerns that the new rules would unnecessarily reduce the protections against undue prejudice by admitting "unreliable but highly prejudicial evidence" in situations where the existing rules would admit only the most probative of this evidence.³⁶⁹ This would increase "the danger of convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person."³⁷⁰ Another concern was the potential for inefficiency and confusion of issues with each trial spinning a web of "mini-trials within trials" as the defendant tried to rebut the other acts

³⁶⁷ U.S. JUDICIAL CONFERENCE, REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995), [hereinafter JUD. CONF. REP.], reprinted in 56 Crim. L. Rep. (BNA) 2139 (Feb. 15, 1995). At about the same time, the American Bar Association House of Delegates adopted a resolution opposing the new rules of evidence. See Myrna S. Raeder, *American Bar Association Criminal Justice Section Report to the House of Delegates*, reprinted in 22 FORDHAM URB. L.J. 343 (1995).

³⁶⁸ JUD. CONF. REP., *supra* note 367, reprinted at 56 Crim. L. Rep. (BNA) 2139.

³⁶⁹ *Id.* at 2139-40.

³⁷⁰ *Id.* at 2139.

evidence.³⁷¹

But perhaps the most frightening concern the Judicial Conference reported was that, as many commenting attorneys noted, the new rules appeared to be mandatory, and therefore unrestrained by other rules of evidence.³⁷² Pointing out that the rules, as drafted, state that evidence "is admissible," without further qualifying language, the report expressed the belief that this was a colorable argument. Comparing the language of Rule 412,³⁷³ amended in the same legislation, which states that evidence "is admissible if it is otherwise admissible under these Rules," the argument becomes stronger.³⁷⁴ The report went on to say that: "[i]f the critics are right, Rules 413-415³⁷⁵ free the prosecution from rules that apply to the defendant - including the hearsay rule and

³⁷¹ *Id.* at 2140.

³⁷² *Id.*

³⁷³ FED. R. EVID. 412(b)(2).

³⁷⁴ JUD. CONF. REP., *supra* note 367, reprinted at 56 Crim. L. Rep. (BNA) 2139, at 2140. The fact that the different rules were passed in the same legislation arguably makes it more likely that if Congress had intended Rules 413 and 414 to be limited by the other rules, they would have said so as they did in Rule 412. In reality, the different rules were probably drafted independently with little thought given to the different qualifying language.

³⁷⁵ Rule 415, Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation, was part of the same legislation that enacted Rules 413 and 414, but is not addressed in this thesis because of its inapplicability in criminal cases.

Rule 403. If so, serious constitutional questions would arise."³⁷⁶

Because of all of these concerns, the Judicial Conference recommended against Rules 413-415. If any amendment were to be made to the rules of evidence, the Conference recommended the amendments to Rules 404 and 405 included in its report. To emphasize the degree of opposition to the new rules, the report noted the "highly unusual unanimity of the members of the Standing and Advisory Committees ... in taking the view that Rules 413-415 are undesirable. Indeed, the only supporters of the Rules were representatives of the Department of Justice."³⁷⁷

Despite this strong opposition to the new rules, Congress took no action to change them and they took effect as scheduled in July of 1995.³⁷⁸ Because of the linkage between the Military Rules of Evidence and the Federal Rules of Evidence, these changes were also likely to apply in time to the military.³⁷⁹

³⁷⁶ JUD. CONF. REP., *supra* note 367, reprinted at 56 Crim. L. Rep. (BNA) 2139, at 2140.

³⁷⁷ *Id.*

³⁷⁸ Criminal Law Notes, *New Military Rules of Evidence 413 and 414*, ARMY LAW., Oct. 1995, at 25.

³⁷⁹ See *supra* text accompanying notes 140-43.

B. *Military Rules of Evidence 413 and 414.*

Military Rule of Evidence 1102 automatically incorporates changes to the Federal Rules of Evidence into the Military Rules of Evidence 180 days after their effective date, absent contrary Presidential action.³⁸⁰ Since the President took no action on the new rules during the 180 days, they became part of the Military Rules of Evidence - without change - on January 6, 1996.³⁸¹ However, the Joint Service Committee on Military Justice, an inter-service body that proposes Military Rules of Evidence changes to the President,³⁸² reviewed the new rules and proposed a military-tailored version.³⁸³ Subsection (a) of the proposed new Military Rules of Evidence would read

³⁸⁰ See *supra* note 140 and accompanying text.

³⁸¹ Criminal Law Notes, *supra* note 378, at 25. Technically Rule 415 was also incorporated, but since the Military Rules of Evidence do not apply in any civil cases, it is an addition with no practical effect. See *Id.* at 25 n.1.

³⁸² The committee also makes other Military Justice recommendations to the President. See SALTZBURG ET AL., *supra* note 129, at xi. According to a Joint Service Committee (JSC) announcement:

The JSC was established by the Judge Advocates General in 1972. The JSC currently operates under Department of Defense Directive 5500.17 of January 23, 1985. It is the function of the JSC to improve military justice through the preparation and evaluation of proposed amendments and changes to the Uniform Code of Military Justice and the Manual for Courts-Martial.

Meeting Notice, 60 Fed. Reg. 51,990 (1995).

³⁸³ Notice of Proposed Amendment, 60 Fed. Reg. 51,988 (1995) (proposed Oct. 4, 1995).

as follows:

Rule 413 (414). Evidence of Similar Crimes in Sexual Assault (Child Molestation) Cases.

(a) In a **court-martial** in which the **accused is charged** with an offense of sexual assault (child molestation), evidence of the **accused's** commission of another offense or offenses of sexual assault (child molestation) is admissible, and may be considered for its bearing on any matter to which it is relevant.³⁸⁴

Comparing this version with the Federal Rule reveals only terminology changes in this key provision to adapt it for military use. Other proposed military changes include deleting Rule 415, due to its inapplicability in military practice; changing the fifteen-day notice requirement to five days; including violations of the Uniform Code of Military Justice in the list of potential similar offenses; and spelling out definitions that the Federal Rule had incorporated by reference.³⁸⁵ In Rule 413(d)(1), the military proposal also adds the words "without consent" to specifically

³⁸⁴ *Id.* (emphasis added). The complete text of the proposed Military Rules (with proposed analysis) appears in Appendix B.

³⁸⁵ *Id.* at 51,989.

exclude consensual sex offenses such as adultery and consensual sodomy.³⁸⁶ These proposed changes to the Federal Rule are adaptations and are not intended to change the basic meaning or effect of the rule. Hence the analysis that follows should apply equally to the new Federal Rules of Evidence and the proposed new Military Rules of Evidence.

VI. Swinging Pendulums; Shifting Burdens.

A. Applying Rule 404(b).

The first issue to analyze when considering the new rules of evidence is whether they were needed at all. In the federal courts, at least, the type of uncharged misconduct evidence the new rules were intended to admit is routinely admitted under Federal and Military Rules of Evidence 404(b).³⁸⁷ The United States Supreme Court made clear in *Huddleston*³⁸⁸ that Rule 404(b) is an inclusionary rule. The only thing it excludes is uncharged misconduct offered **solely** to prove character.

³⁸⁶ *Id.*

³⁸⁷ 1 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 577 (6th ed. 1994); Strong, *supra* note 335, at 13-14. See *supra* text accompanying notes 333-53.

³⁸⁸ *Huddleston v. United States*, 485 U.S. 681 (1988). See *supra* text accompanying notes 145-67.

I noted earlier the distinction between the use of the word "character" and the use of the word "propensity." In my view, this is far more significant than most commentators have admitted. What many commentators do admit is that accepted "non-character" uses of uncharged misconduct evidence under Rule 404(b) derive their relevance from propensity assumptions.³⁸⁹ Since we already recognize that the list of "non-character" uses in the rule is "exemplary and not exhaustive," there is no reason to think that other propensity-related categories could not be added to that list.

Deviant sexual propensity exhibited in past conduct is more of a "characteristic" than a "character." Many courts have recognized this fact, some admitting the propensity under the "intent" or "motive" rubrics and some expanding the idea of a "common scheme or plan" beyond all logical limits.³⁹⁰

³⁸⁹ For example, using *modus operandi* to identify a perpetrator assumes that person has a propensity to commit crimes the same way every time. Likewise, using prior similar acts to prove an intent to commit that kind of act generally assumes propensity to commit the prior act again. See, e.g., Roger C. Park & David P. Bryden, *The Twenty-Second Annual Kenneth J. Hodson Lecture: Uncharged Misconduct Evidence in Sex Crime Cases: Reassessing the Rule of Exclusion*, 141 MIL. L. REV. 171, 175 (1993); Paul F. Rothstein, *The Federal Rules of Evidence in Retrospect: Observations From the 1995 AALS Evidence Section: Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1260-61 (1995).

³⁹⁰ See *supra* text accompanying notes 333-53. See also Strong, *supra* note 335.

Judge Cox's concurring opinion in *Munoz*,³⁹¹ however, illuminated the essence of my argument. By showing how probative this propensity evidence is and at the same time questioning whether or not sexuality even belonged in the "character" realm, he shed light on where the focus should be in applying Rule 404(b).

The essential purpose of Rule 404(b), as it has evolved through judicial interpretation, is to prevent gratuitous "mud-slinging" in court. If the uncharged misconduct evidence has **any** relevance, other than to show "bad character," then Rule 404(b) allows it, even if it may show "bad character" as well. Of course Rule 403 is still available to allow judicial discretion in how far to allow "any relevance" to go, but the evidence "is admissible," subject to that discretion. So assuming that Rules 413 and 414 are still subject to Rule 403 - not a forgone conclusion by any means - then they really do not expand the universe of admissible evidence in any favorable way.

One of the arguments in favor of the new rules was that they allow more intellectual honesty in admitting this type of evidence, rather than expecting judges to stretch or twist Rule 404(b) to admit the evidence. My argument is that the

³⁹¹ United States v. Munoz, 32 M.J. 359 (C.M.A.), cert. denied, 502 U.S. 967 (1991). See *supra* text accompanying notes 337-53.

evidence is admissible under Rule 404(b), without any stretching or twisting, simply by reading the rule to mean what it says. Often the evidence falls quite easily within the "intent," "motive," or "plan" uses that most courts recognize. But even if the evidence in a particular case does not fall into one of these categories without stretching, the court can create its own category such as "unique sexual interest"³⁹² or "perverse sexual desire"³⁹³ or "lack of inhibitions from committing deviant or forcible sexual acts."³⁹⁴ Courts are understandably reluctant to break new ground in this area, a reluctance symptomatic of the common law system, but Rule 404(b) allows it. The key is that the evidence has some probative value other than to show the accused is a "bad person." Perhaps the judicial reluctance to creatively apply Rule 404(b) is the best reason for enacting the new rules.

One argument against my theory is that Rule 404(b) merely codified the common law rules on uncharged misconduct and the

³⁹² See, e.g., *United States v. Rhea*, 33 M.J. 413, 422 (C.M.A. 1991); *United States v. Mann*, 26 M.J. 1, 3 (C.M.A.), cert. denied, 488 U.S. 824 (1988).

³⁹³ See, e.g., *United States v. Bender*, 33 M.J. 111, 112 (C.M.A. 1991) (quoting the trial judge's reasoning for admitting evidence of prior acts with another victim).

³⁹⁴ This category would be more relevant in sex crime cases with adult victims, since the desires or interests of the perpetrator might not be as unique as his mode of fulfilling them.

use of the word "character" instead of "propensity" was not a significant change. While the common law rule from the time of *Rex v. Cole*³⁹⁵ prohibited using evidence showing an accused "had a tendency to such practices" as he was accused of, exceptions quickly arose where propensities were viewed as being fair and relevant evidence on particular points. The emergence of the "lustful disposition" exception was a case right on point.³⁹⁶ The drafters of Rule 404(b) must have recognized this, and this may very well explain their careful choice of words. They could have easily barred "propensity" evidence instead of "character" evidence, but they must have realized this would have been intellectually dishonest in light of the permissible purposes they listed in the second sentence of the rule. So they chose to say "character."³⁹⁷ While most courts and commentators continue to use "character" and "propensity" interchangeably, one need only think about what the words mean in everyday use to see that they are not the same.³⁹⁸

³⁹⁵ See *supra* text accompanying notes 44-50.

³⁹⁶ See *supra* text accompanying notes 103-06.

³⁹⁷ The advisory committee notes are somewhat ambiguous on the definition of "character." While they use various propensity examples of "character," they also highlight the "bad person" inference as the primary evil to be avoided. FED. R. EVID. 404(a) advisory committee's note.

³⁹⁸ While my argument may seem radical to some, at least one prominent commentator has advanced a similar theory. See Rothstein, *supra* note 389, at 1264-65.

B. *Applying Rules 413 and 414.*

The intent of the new rules of evidence was essentially to enact a "lustful disposition" exception to Rule 404(b). Assuming, *arguendo*, that Rule 404(b) prohibits the use of propensity evidence of any kind not specifically listed in the rule, then this would be a valid purpose for new rules. After all, the "lustful disposition" exception has a long history and substantial support in both scientific data and common sense.³⁹⁹ But these new rules, while crafted quite simply and understandably, did not undergo the rigorous testing to which other Federal Rules of Evidence were subjected. As the Judicial Conference Report pointed out, they carry the baggage of ambiguity and overbreadth in their text. The results may not be what the drafters intended.

1. *What Evidence Comes In?*--The first question the new rules raise is whether or not the uncharged acts admitted really have to be similar to the charged offense, and if so, how similar?⁴⁰⁰ The titles of the rules use the words "similar

³⁹⁹ See Reed, *supra* note 103, at 168-69; Stone, *supra* note 103; Karp, *supra* note 357, at 23.

⁴⁰⁰ Under Rule 404(b), prior acts offered to prove intent based on their similarity to the charged acts must have more than just minimal similarity to be admitted. See, e.g., *United States v. Hadley*, 918 F.2d 848, 851-52 (9th Cir. 1990), *cert. granted*, 503 U.S. 905, and *cert. dismissed*, 506 U.S. 19 (1992); *United States v. Foskey*, 636 F.2d 517, 523-25 (D.C. Cir. 1980).

crimes," but this does not appear to limit the text of the rule. The apparent intent of these words is that if another offense is one in the general category of "sexual assault" or "child molestation," then it is similar. The problem with this interpretation is that it opens up a broad category of other offenses as being presumptively relevant and admissible, without considering that the dissimilarity of the other offense may make it irrelevant.⁴⁰¹ Rather than making the proponent of the evidence demonstrate some relevance, the new rules presume it and shift the burden of exclusion to the defense. That the defense may be able to exclude irrelevant evidence that "is admissible" under these rules is not a forgone conclusion. It assumes that Rules 402 and 403 still apply to this type of evidence, which is not clearly the case.

⁴⁰¹ For example, Rule 413 incorporates any conduct that violates chapter 109A of title 18, United States Code into its definition of "offense of sexual assault." FED. R. EVID. 413(d)(1). That chapter includes offenses commonly known as "statutory rape" in which consent is not an issue. 18 U.S.C. §§ 2241(c), 2243(a) (1994). A prior incident of a "sexual act" or even the lesser "sexual contact" (which includes touching through the clothing) with a minor would be admissible under Rule 413 to prove a forcible rape. See 18 U.S.C. §§ 2244, 2246(3) (1994). Chapter 109A also includes the offense of "abusive sexual contact" with adults. 18 U.S.C. § 2244(b) (1994). So a prior incident of sexual harassment such as pinching someone's rear end without permission would be admissible under Rule 413 to prove a forcible rape. The probative value of these uncharged acts to prove the charged offense is questionable. Nevertheless, the author of the new rules asserts that they "[do] not admit evidence of offenses which are dissimilar in character from the charged offense...." David J. Karp, *Response to Professor Imwinkelried's Comments*, 70 CHI.-KENT L. REV. 49 (1994) (writing in response to Edward J. Imwinkelried, *Some Comments About Mr. David Karp's Remarks on Propensity Evidence*, 70 CHI.-KENT L. REV. 37 (1994)).

Without a doubt, the drafters of these new rules and the legislators that sponsored them throughout the law-making process intended that Rules 402 and 403 would still apply.⁴⁰² They intended only to create an exception to Rule 404(b). But as the Judicial Conference Report noted, many attorneys have read the plain language of the rules as overriding the other rules of evidence that might conflict with their mission of admissibility.⁴⁰³ In construing a statute, one need not look to the legislative intent if the plain language is unambiguous.⁴⁰⁴ Fortunately, the fact that different people read these rules different ways shows that they are ambiguous. Mr. David Karp, the author of the rules, stated that they are "rules of admissibility, and not mandatory rules of admission."⁴⁰⁵ This is also the best interpretation of the

⁴⁰² See Karp, *supra* note 357, at 19; 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari); 140 CONG. REC. S12,990 (daily ed. Sep. 20, 1994) (statement of Sen. Dole).

⁴⁰³ See *supra* text accompanying notes 367-76.

⁴⁰⁴ Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 808 n.3 (1989) (citing United Air Lines, Inc. v. McMann, 434 U.S. 192, 199 (1977)). See also James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95, 119 n.122 (1994) (collecting U.S. Supreme Court cases). At least one commentator has opined that the plain language of the rules indicates that the other rules still apply. Strong, *supra* note 335, at 22 & n.114 (quoting what is now FED. R. EVID. 413(c), 414(c)).

⁴⁰⁵ Karp, *supra* note 357, at 19.

words "is admissible" in the rules.⁴⁰⁶ While their clarity would be greater with the additional phrase "if otherwise admissible under these rules," they clearly do not mandate admission in the way that Rule 609(a)(2) does with its "shall be admitted" language.⁴⁰⁷ Although the novelty of the language in the new rules leaves them subject to either interpretation,⁴⁰⁸ the other rules of evidence should still apply in the absence of an explicit intent to the contrary.⁴⁰⁹

⁴⁰⁶ But see Duane, *supra* note 404, at 119 & n.121 (quoting the BLACK'S LAW DICTIONARY definition of "admissible evidence" as evidence the judge is "bound to receive").

⁴⁰⁷ MCM, *supra* note 131, MIL. R. EVID. 609(a)(2). Rule 609(a)(2) states that *crimen falsi* convictions "shall be admitted" to impeach a witness and "it is widely agreed that this imperative, coupled with the absence of any balancing language, bars exercise of judicial discretion pursuant to Rule 403." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 525-26 (1989). See also 1 SALTZBURG ET AL., *supra* note 387, at 577-78 (noting the absence in the new rules of either the mandatory language of Rule 609(a)(2) or the specific incorporation of a balancing test as in Rule 609(a)(1)).

⁴⁰⁸ The new rules seem to strike a middle ground between Rule 404(b)'s "may ... be admissible" and Rule 609(a)(2)'s "shall be admitted," making precedents applying to either of those rules inapplicable. The closest comparison that can be made is with Rule 404(a) which states that character evidence "is not admissible" to prove action in conformity, with three exceptions. MCM, *supra* note 131, MIL. R. EVID. 404(a). Arguably the three exceptions would then state that certain evidence "is admissible" since that is the opposite of the rule to which they are exceptions. Since we know that the exceptions to Rule 404(a) have not caused a wholesale overruling of the other rules of evidence, the language "is admissible" should not be given that effect.

⁴⁰⁹ The very fact that these new rules were drafted and approved through a different process than the other rules to which we are comparing them decreases the weight the comparison should carry. When commentators have compared Rule 412's "is admissible, if otherwise admissible under these Rules" with the new rules' "is admissible" they apply canons

So if we assume that Rule 402 does apply, does the relevance requirement limit the use of uncharged misconduct evidence? Probably not. In the broadest sense, any uncharged misconduct is relevant to prove any crime. The logical probative chain would be that because a person did something bad on one occasion, he or she is either a "bad person" and likely to do other bad things, or he or she has overcome particular inhibitions on at least one occasion and is therefore less likely to be inhibited in the future. The first alternative is the classic "evil disposition" propensity situation, but the second alternative looks less like general propensity and more like proof of a more specific mental state. Professor Stone argued that any "similar" acts are always going to be relevant.⁴¹⁰ But if the acts are dissimilar, even if bad, they may not even satisfy the basic relevance requirement.

Because these new rules limit their scope to other offenses of the same general type, we can probably assume that

of statutory interpretation to conclude that the extra language in Rule 412 could not have been intended to be superfluous. See, e.g., Duane, *supra* note 404, at 118-19 & n.120. This conclusion gives the law-making process too much credit. The sheer volume of information included in the legislation makes it impossible for legislators to conduct a detailed comparison of every provision, especially when, as here, the provisions are added in a late amendment as part of a compromise and quickly passed with little actual floor debate. See *Id.* at 95-97; Kyl, *supra* note 357, at 659 n.6.

⁴¹⁰ Stone, *England*, *supra* note 12, at 955-56.

any uncharged act meeting the rule's description is at least minimally relevant. But is there any kind of nexus requirement to show a tighter relevance of the prior acts to the charged acts? As we have seen, the nexus requirement that used to be a part of the Rule 404(b) equation has migrated to Rule 403.⁴¹¹ The courts have applied the relevance requirement in a very non-limiting way. The mere fact that the uncharged acts in these cases will be of the same general type as the charged offense will likely satisfy this low relevance standard.⁴¹² The real limitation on this evidence, if any, will have to come from Rule 403.

If the intent of the new rules was to limit judicial discretion to exclude this "typically relevant and probative" evidence, it would not make sense for the new rules to remain subject to the virtually absolute judicial discretion of Rule 403. But a reading of the legislative history of these rules demonstrates that this was not the intent.⁴¹³ The primary

⁴¹¹ See *supra* text accompanying notes 288-332.

⁴¹² Even though the relevance standard is quite low, the possibility exists that irrelevant evidence could be offered under the new rules. For example, a prior incident of unlawful consensual sex with an under-age partner could be offered to prove lack of consent in a later trial for forcible rape. A prior incident of sexual harassment pinching could be offered to prove propensity to commit rape. The relevance of this type of evidence on these issues is at least questionable. See *supra* note 401.

⁴¹³ See 137 CONG. REC. S3238-39 (daily ed. Mar. 13, 1991) (analysis statement accompanying rules).

focus of the new rules was to serve as a model for the states, most of which have adopted rules of evidence based on the Federal Rules. Because every state has its own courts to interpret these rules, not every state interprets them the same way. Some states interpret their version of Rule 404(b) as allowing uncharged sexual offenses to show "intent" or "motive,"⁴¹⁴ while other states have excluded the evidence as prohibited propensity evidence.⁴¹⁵ The intent of the new rules was simply to send the message to those states that this evidence is admissible. The legislative history reveals no sinister intent to force judges to admit this evidence even if they find the danger of unfair prejudice substantially outweighs its probative value. Hence the Rule 403 balancing should continue to be the focus for lawyers and judges wrestling with the admissibility of this brand of uncharged misconduct evidence, just as it has been recently in the Rule 404(b) arena.

Applying Rule 403 may allow judges to be able to avoid many of the bizarre results that could come from a strict application of Rules 413 and 414 in particular cases. For example, a prior incident of sexual harassment might meet the

⁴¹⁴ See, e.g., *Elliott v. State*, 600 P.2d 1044 (Wyo. 1979), cited in 137 CONG. REC. at S3239.

⁴¹⁵ See, e.g., *Getz v. State*, 538 A.2d 726 (Del. 1988), cert. denied, 506 U.S. 924 (1992), cited in 137 CONG. REC. at S3240.

minimal relevance requirement to be admissible in a rape case.⁴¹⁶ But the judge could weigh its probative value as minimal and exclude it to avoid the substantial danger of unfair prejudice, or even just the potential for confusion of issues and waste of time that it presents.⁴¹⁷ Other examples of potentially admissible acts that the judge could exclude on Rule 403 grounds might include sexual acts or contacts coerced as part of a fraternity initiation or consensual sexual acts or contacts unknowingly committed with a minor. The decision would have to be particular to the case, with the judge considering whether or not the uncharged acts had any real (as opposed to minimal) probative value to the issues in the case. The bottom line is that judges will continue to have discretion and the actual impact of these new rules will ultimately depend on how judges exercise that discretion.⁴¹⁸

2. *How Will the Evidence Come In?*--Assuming that we can determine which uncharged acts are relevant and probative in a given case, the next question is how to present them to the

⁴¹⁶ See *supra* notes 401, 412.

⁴¹⁷ MCM, *supra* note 131, MIL. R. EVID. 403. Rule 403 reads as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

⁴¹⁸ See 140 CONG. REC. H8968, H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari); 140 CONG. REC. S12,990 (daily ed. Sep. 20, 1994) (statement of Sen. Dole).

court. Again here, the imprecise drafting of the new rules leaves unanswered questions. By stating that this evidence "is admissible," the rules might be interpreted not only as overriding Rules 402 and 403 as discussed above, but also as overriding any other rules that normally restrict admissibility.⁴¹⁹ This could include lifting the general prohibition on hearsay evidence, overriding any "best evidence" or authenticity restrictions, and even short-circuiting the rules restricting opinion testimony.

As we have found, this clearly was not the drafters' or sponsors' intent.⁴²⁰ Assuming that the words "is admissible" are sufficiently ambiguous to allow resort to legislative intent, most of these problems will be solved.⁴²¹ The hearsay

⁴¹⁹ See *supra* text accompanying notes 402-09. See also Duane, *supra* note 404, at 119.

⁴²⁰ See *supra* text accompanying notes 402-09.

⁴²¹ Even assuming the other rules of evidence still apply, some of the conflicts cannot be resolved. See Duane, *supra* note 404, at 115-20. The most serious is the conflict between the new rules and the character evidence rules discussed *infra*. Another irreconcilable conflict would remain between the new rules and the witness impeachment rules. Rules 608 and 609 strictly limit available impeachment methods, including Rule 608(b)'s prohibition on extrinsic evidence of prior acts not resulting in a conviction. MCM, *supra* note 131, MIL. R. EVID. 608, 609. The new rules, on the other hand, state that prior acts evidence "may be considered for its bearing on any matter to which it is relevant." FED. R. EVID. 413, 414. Since prior offenses are at least minimally probative of credibility, once prior offense evidence is admitted under the new rules, the "may be considered" language would allow use of the evidence for purposes prohibited under Rules 608 and 609. See Duane, *supra* note 404, at 116 & n.110.

rule will still apply, as well as most other restrictions on the form of admissible evidence. But one very significant problem cannot be solved so easily.

Putting aside my argument that "character" is not the same thing as "propensity," under the conventional approach Rules 413 and 414 actually override not only Rule 404(b) but Rule 404(a) as well. The new rules specifically allow the uncharged acts evidence for any relevant purpose, including to prove propensity or disposition, which is conventionally regarded as "character evidence." Yet the new rules do not add an exception to Rule 404(a)'s limitations on character evidence. Even if you assume a new exception into Rule 404(a), this raises more questions about applying Rule 405. Rule 405(a) requires that any proof of character be made only by reputation or opinion evidence, not by specific acts evidence. Clearly the drafters of the new rules did not intend that proof of the uncharged offenses had to be in the form of reputation or opinion, but the imprecision of their rules has created this confused state of the law. At the very least, a prosecutor can make the argument that such reputation and opinion evidence is now admissible to prove the now-permitted character traits of the accused. This is a conflict that cannot be interpreted away. The rules require some further amendment.

Among the less-taxing questions about how to admit the

evidence are the issues of standard of proof and limiting instructions. First, a court should not need to give any limiting instructions because the new rules specifically say the use of the evidence is not limited except by relevance concerns.⁴²² As far as the standard of proof is concerned, the analogous nature of the uncharged acts evidence admitted under the new rules and under Rule 404(b) indicates that the same standard should apply. In *Huddleston*, the Supreme Court clarified that no elevated standard of proof should be read into Rule 404(b).⁴²³ All that was required was that there be sufficient evidence for the jury to reasonably conclude by a preponderance of the evidence that the uncharged acts occurred. This was evident, the Court said, in Rule 104(b)'s standard for "relevancy conditioned on fact."⁴²⁴ The Court of

⁴²² See MCM, *supra* note 131, MIL. R. EVID. 105.

⁴²³ *Huddleston v. United States*, 485 U.S. 681 (1988). See *supra* text accompanying notes 145-67.

⁴²⁴ Mil. R. Evid. 104(b) reads as follows:

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the military judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. A ruling on the sufficiency of evidence to support a finding of fulfillment of a condition of fact is the sole responsibility of the military judge, except where these rules or this Manual provide expressly to the contrary.

MCM, *supra* note 131, MIL. R. EVID. 104(b). The first sentence of the rule is identical to the Federal Rule of Evidence, except the word "court" was changed to read "military judge." FED. R. EVID. 104(b). The second sentence was added to the

Military Appeals applied this same analysis in *Mirandes-Gonzalez*, rejecting the prior "clear and convincing" standard in favor of a preponderance standard.⁴²⁵ Because the relevancy of uncharged acts evidence under Rules 413 and 414 is conditioned on the fact that the accused actually committed the uncharged acts, the same preponderance standard should apply to the new rules as well.

C. *Constitutional Questions.*

Constitutional challenges to the use of uncharged misconduct evidence have historically focused on the rules "as applied" in particular cases.⁴²⁶ Courts have refused to hold that Rule 404(b) is facially unconstitutional simply because it allows admission of evidence that might tend to undermine the presumption of innocence or the double jeopardy bar.⁴²⁷ Rules 413 and 414 have yet to be tested, however, and the ease with which they seem to brush aside a centuries-old tenet of our jurisprudence inevitably will invite constitutional challenges.

Military Rule of Evidence to clarify the role of the judge in deciding admissibility. MCM, *supra* note 131, MIL. R. EVID. 104(b) analysis, app. 22.

⁴²⁵ *United States v. Mirandes-Gonzalez*, 26 M.J. 411 (C.M.A. 1988). See *supra* text accompanying notes 275-82.

⁴²⁶ See IMWINKELRIED, *supra* note 12, § 10:01.

⁴²⁷ *Id.*

1. *Due Process*--The landmark Supreme Court case of *In Re Winship*⁴²⁸ established that the Due Process Clause requires the government to prove the accused's guilt beyond a reasonable doubt. This requirement, the Court said, "provides concrete substance for the presumption of innocence - that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" ⁴²⁹ The Court highlighted two important interests that this high standard serves: the value our society places on the good name and freedom of every individual, and the need for the community to accept the criminal justice system as fair and just.⁴³⁰ If the community believes that the system can easily convict an innocent person, the legitimacy so necessary to a democracy suffers.

Federal Courts have long held that the general exclusion of uncharged misconduct evidence is an enforcement mechanism for the presumption of innocence and the high standard of proof required to overcome it.⁴³¹ As one court stated: "When

⁴²⁸ 397 U.S. 358 (1970).

⁴²⁹ *Id.* at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

⁴³⁰ *Id.* at 363-64.

⁴³¹ See, e.g., *United States v. Daniels*, 770 F.2d 1111, 1118 (D.C. Cir. 1985); *United States v. Foskey*, 636 F.2d 517, 523 (D.C. Cir. 1980); *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977), *cert. denied*, 439 U.S. 847 (1978); *Government of Virgin Islands v. Toto*, 529 F.2d 278, 283 (3d Cir. 1976).

such evidence inadvertently reaches the attention of the jury, it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence. A drop of ink cannot be removed from a glass of milk."⁴³² These courts have recognized that uncharged misconduct is often relevant to the case at bar to prove something other than "bad character," and in those cases the government's use of the evidence satisfies due process, so long as the judge has applied a proper Rule 403 balancing.⁴³³ But when the government offers uncharged misconduct evidence solely to prove "bad character," the courts hold that the presumption of innocence has been offended.

The Supreme Court, as noted earlier, has yet to decide this issue. In *Estelle v. McGuire*, the Court specifically noted that it had not reached the issue.⁴³⁴ But as long ago as 1967, Chief Justice Warren had little doubt about it. In his separate opinion in *Spencer v. Texas*,⁴³⁵ he stated that:

While this Court has never [so] held ... our

⁴³² *Toto*, 529 F.2d at 283.

⁴³³ See, e.g., *Foskey*, 636 F.2d at 523; *Toto*, 529 F.2d at 283.

⁴³⁴ 502 U.S. 62, 75 n.5 (1991). See *supra* text accompanying notes 217-26.

⁴³⁵ 385 U.S. 554, 569 (1967) (Warren, C.J., dissenting in part, concurring in part).

decisions [and those of other courts] suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause. Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence....⁴³⁶

The new rules will raise this question directly, giving the Court little opportunity to avoid the issue.⁴³⁷ They specifically allow uncharged misconduct evidence, including but not limited to prior convictions, to be admitted solely to prove the accused's propensity to commit a particular type of crime. The reason these rules will survive this challenge, if they do, is Rule 403. If judges still have the discretion to exclude evidence that is unfairly prejudicial, this can be the safeguard that prevents unconstitutional application of Rules 413 and 414. Because the uncharged acts evidence is relevant in at least some cases, as indicated by its frequent admission under Rule 404(b), the new rules should not be found to be facially invalid. The fact that the uncharged acts evidence need not be proven beyond a reasonable doubt will invite the charge that the new rules lower the burden of proof the government must meet to prove guilt. But this argument will not likely carry any more weight than the analogous argument

⁴³⁶ *Id.* at 572-75.

⁴³⁷ See Duane, *supra* note 404, at 107-08 & n.71.

against Rule 404(b) evidence, which has been routinely rejected by the courts.⁴³⁸

Why is Rule 403 the key to constitutionality for the new rules? After all, drafter David J. Karp argues correctly that the genesis of the uncharged misconduct rule was the desire to give "fair notice" of the charges and to limit the scope of trials.⁴³⁹ Since a notice provision and a scope restriction have been built into the new rules, he argues, they should satisfy due process.⁴⁴⁰ This whole idea of preventing undue prejudice is overrated, he says, claiming that the whole "'prejudice' idea may have originated as a rationalization for an established rule that arose for different reasons."⁴⁴¹ He

⁴³⁸ See IMWINKELRIED, *supra* note 12, § 10:11. Cf. Dowling v. United States, 493 U.S. 342, 352-54 (1990). See *supra* text accompanying notes 168-80, 212-16. See also DOJ REPORT, *supra* note 44, reprinted at 22 U. MICH. J.L. REF. 707, at 749 & n.102.

⁴³⁹ Karp, *supra* note 357, at 27. See *supra* text accompanying notes 27-30.

⁴⁴⁰ Karp, *supra* note 357, at 21-22.

⁴⁴¹ *Id.* at 27-28. In fact, the Justice Department Report that Mr. Karp cites heavily in his defense of the new rules summarily dismisses a due process challenge to admitting criminal histories at trial. DOJ REPORT, *supra* note 44, reprinted at 22 U. MICH. J.L. REF. 707, at 748-49. The Report states:

[T]he 'fair trial' arguments all rest on the unsupported empirical assumption that prior-crimes evidence is likely to result in unjustified convictions based on antagonism or to be taken by the trier for more than it is rationally worth. Because there is no reason to believe this is the case, there is no basis for implying special constitutional restrictions on the use of such

also correctly notes that the local juries in old England were often well-acquainted with the characters of the parties and that prejudice could therefore not have been a major factor in restricting uncharged misconduct evidence.⁴⁴²

While Mr. Karp's observations are true up to that point, he overlooks the trend that Blackstone recorded toward jury impartiality as a fundamental fairness concept.⁴⁴³ Mr. Karp argues that jury knowledge of the parties naturally decreased due to urbanization and population growth. This, he says, lead to a relaxation of the uncharged misconduct prohibition

evidence based on concerns over prejudice.

Id. at 749 (citations omitted). The report bases this claimed lack of prejudice in part on the Kalven & Zeisel jury study. *Id.* at 732-33 (citing HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966)). This presents an excellent example of the maxim that "You can prove anything with statistics." The authors of the study themselves concluded, and many have cited the study for the proposition, that their results lend "support to the legal tradition which so closely guards the disclosure of a prior record in a criminal case." HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 389-90 (1966). See Weissenberger, *supra* note 18, at 581 & n.10; David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 *FORDHAM URB. L.J.* 305, 325 & n.100 (1995). But see Park & Bryden, *supra* note 389, at 188 (noting that the study data actually show prejudice against victims in consent defense rape cases). The Justice Department Report recognized the contrary conclusion of Kalven & Zeisel and dismissed it as ill-founded. DOJ REPORT, *supra* note 44, reprinted at 22 *U. MICH. J.L. REF.* 707, at 733 n.49. With the number of times "common sense" has been used to justify the new rules, however, one would think that it could also be used to determine that criminal history evidence will be somewhat prejudicial, even without jury study results.

⁴⁴² Karp, *supra* note 357, at 28-29.

⁴⁴³ See *supra* text accompanying notes 31-39.

to give the unfamiliar jury relevant knowledge about the parties in other ways.⁴⁴⁴ But Blackstone's observations point out that the decrease in juror knowledge of the parties was not a mere accident of growth, but a intentional trend, fostered in pursuit of the impartiality necessary for fair decisions, which in turn gave the system legitimacy.⁴⁴⁵ Professor Stone's observations illustrate that, rather than relaxing the uncharged misconduct prohibition, the courts were actually tightening it from the original non-limiting version of the rule that evolved from the Treason Act of 1695.⁴⁴⁶

Examining this history in perspective, we can more easily see why the drafters of the Bill of Rights saw fit to specifically require trials by an "impartial jury" as part of the Sixth Amendment.⁴⁴⁷ Preventing undue prejudice was an

⁴⁴⁴ Karp, *supra* note 357, at 28-29.

⁴⁴⁵ See *supra* text accompanying notes 31-41.

⁴⁴⁶ See *supra* text accompanying notes 42-55.

⁴⁴⁷ U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...."). Even though Article III of the Constitution does not mention the word "impartial," U.S. CONST. art. III, § 2, cl. 3, the drafters must have been thinking about the concept even before it appeared in the Bill of Rights. Alexander Hamilton referred to the jury as "a barrier to the tyranny of popular magistrates in a popular government." THE FEDERALIST No. 83, at 332 (Alexander Hamilton) (New York, McLean 1788). For a jury to be a "barrier" to the oppression of individuals by the masses, some safeguards would be required to ensure the impartiality of that jury.

important objective for a fair system that respected the rights of the accused, not a mere "rationalization" for the uncharged misconduct rule. The founding fathers were living in the time of Blackstone. Undoubtedly many of them had read his *Commentaries*. They knew that in their fledgling democracy, the government would have to have legitimacy to survive. Providing a fair trial by an impartial jury was a prerequisite to that legitimacy, not an accident of poor drafting.

As Justice White observed in *Dowling v. United States*,⁴⁴⁸ the primary effect of the Due Process Clause is to enforce the

While the Sixth Amendment right to an impartial jury may not apply directly to a court-martial setting, Congress, the President, and the courts have provided a military accused with a system of rights known as "military due process." Generally these rights are thought to be at least as protective as the analogous Constitutional rights. Among them is Article 25 of the Uniform Code of Military Justice, 10 U.S.C. § 825 (1994), which includes restrictions on the qualification of members based on circumstances that would prevent them from being impartial. See DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* §§ 1-1(B), 8-3(C)(1), 15-10(B), 15-10(C)(2) (3d ed. 1992 & Supp. 1995). Rule for Courts-Martial 912(f)(1)(N) specifically states:

(1) A member shall be excused for cause whenever it appears that the member: ... (N) Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.

MCM, *supra* note 131, R.C.M. 912(f)(1)(N). See also *United States v. Lake*, 36 M.J. 317 (C.M.A. 1993); *United States v. Brown*, 34 M.J. 105 (C.M.A. 1992).

⁴⁴⁸ 493 U.S. 342 (1990).

"specific guarantees enumerated in the Bill of Rights."⁴⁴⁹ The Sixth Amendment's specific guarantee of an "impartial jury" dictates that any procedure that denies the accused an impartial jury will violate due process. If a court admits evidence for no other purpose than to sling mud on the accused, then the jury can no more be impartial than if they came into the courthouse with that prior knowledge of the accused.⁴⁵⁰ This analysis gives constitutional dimension to Rule 403's balancing test. The drafters of the rules of evidence realized that all evidence of uncharged misconduct could be at least minimally probative of guilt. Rule 404(b) excluded use of this evidence on a mere "bad character" theory. But some evidence of propensity was actually highly probative, so some other safeguard was necessary to prevent mud-slinging, while allowing the really probative evidence in. Rule 403 is just such a safeguard. While it does allow the

⁴⁴⁹ *Id.* at 352-53. See *supra* text accompanying notes 212-16.

⁴⁵⁰ Professor Imwinkelried has also pointed out that if jurors ultimately convict the accused because of his prior criminal activity, despite reasonable doubts about the charged offense, this will violate the Eighth Amendment as well. U.S. CONST. amend. VIII; Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting The Experiment Off On The Right Foot*, 22 FORDHAM URB. L.J. 285, 291 (1995). The Supreme Court has held that the Eighth Amendment ban on cruel and unusual punishment prohibits criminalizing a person's status. *Id.* (citing *Robinson v. California*, 370 U.S. 660 (1962)). But see Norman M. Garland, *Some Thoughts on the Sexual Misconduct Amendments to the Federal Rules of Evidence*, 22 FORDHAM URB. L.J. 355, 356 & n.10 (1995) (asserting that the "status" argument "does not present a serious threat to the amendments' validity").

trial judge substantial discretion, it also allows the trial judge to prevent an unconstitutional character assassination which could serve no other purpose than to prejudice the jury.

The Due Process Clause also incorporates a "fundamental fairness" requirement that transcends the specific guarantees of the Bill of Rights, although this test is applied sparingly.⁴⁵¹ This raises the further question of whether or not the new rules of evidence might be "fundamentally unfair." When we look at the values embodied in our system of justice, we have to ask ourselves if rules that allow evidence of a person's life history to prove "bad character" are consistent with those values. Our tradition has long rejected the inquisitory system in favor of the accusatory system.⁴⁵² When someone mentions "the Spanish Inquisition" or recalls the question from the McCarthy Hearings "Are you now or have you ever been a member of the Communist Party?" we cringe in the belief that this is somehow unfair in and of itself. But many other countries currently use an inquisitory system, and they tend to believe it is a better vehicle for finding the truth and avoiding "lawyer tricks."⁴⁵³

While this is a tempting lure, and many aspects of our

⁴⁵¹ 493 U.S. at 352-53.

⁴⁵² See *supra* text accompanying notes 12-43.

⁴⁵³ LAWRENCE M. FRIEDMAN, *AMERICAN LAW* 68-70 (1984).

own system have become more inquisitory,⁴⁵⁴ we must resist the temptation to believe that "truth" is the primary objective of our judicial system.⁴⁵⁵ The high value we have consistently put on the Due Process Clause pointedly demonstrates that our emphasis is on fairness, far more than on truth. If we abandon that fairness to try to convict a few more criminals,⁴⁵⁶ then we lose a large part of the legitimacy of this wonderfully crafted democracy. As Blackstone said: "[T]he law holds, that it is better that ten guilty persons escape, than that one innocent suffer."⁴⁵⁷ That is the principle behind our system of justice. It might not be too popular at a time when the focus is on victim's rights. But if our system convicts an innocent person, is that person not a victim?

2. *Equal Protection*--Another constitutional issue is whether or not the new rules violate the equal protection guarantee incorporated into the Fifth Amendment's Due Process

⁴⁵⁴ For example, family court proceedings. *Id.*

⁴⁵⁵ See Weissenberger, *supra* note 18, at 587 & n.31 ("[T]he idea of statistical accuracy is fundamentally at odds with the value in our legal system of justice or fairness to individual litigants.").

⁴⁵⁶ Some commentators believe that instead of convicting more criminals, the new rules will primarily help convict more innocent people. See, e.g., Duane, *supra* note 404, at 99-101, 107-11.

⁴⁵⁷ 4 BLACKSTONE, *supra* note 13, at *352.

Clause.⁴⁵⁸ An equal protection analysis could apply under at least two different theories. First, the new rules treat persons accused of crimes differently based on the type of crime alleged. Second, the new rules treat the parties to the case differently in two ways. Read in conjunction with Rule 412, the new rules allow the government to offer evidence of the accused's sexual history while preventing the accused from offering evidence of the victim's sexual history except in limited circumstances.⁴⁵⁹ Furthermore, the new rules allow the government to offer specific acts evidence to prove the accused's criminal character or propensity, but do not allow the accused to rebut this evidence except with reputation or opinion evidence under Rule 405.⁴⁶⁰

Before analyzing these theories of disparate treatment

⁴⁵⁸ See *Bolling v. Sharpe*, 347 U.S. 497 (1954). See also *IMWINKELRIED*, *supra* note 12, § 10:28.

⁴⁵⁹ See *MCM*, *supra* note 131, MIL. R. EVID. 412. See also *IMWINKELRIED*, *supra* note 12, § 10:31.

⁴⁶⁰ See *MCM*, *supra* note 131, MIL. R. EVID. 405. See also *IMWINKELRIED*, *supra* note 12, § 10:29; *Duane*, *supra* note 404, at 122-24. Professor Duane also cites the new rules' disparate treatment of Native Americans in light of the fact that the new Federal Rules of Evidence will only apply to federal sex offense cases, most of which are prosecuted for violations committed on Indian lands. *Id.* at 113-15. While he does not argue this disparate impact alone violates equal protection, even if it did this would not be a significant issue for the Military Rules of Evidence. Because the Military Rules of Evidence apply to all courts-martial and the armed forces are generally composed of a representative cross-section of the population, the Military Rules should not have any similar disparate impact.

sanctioned by the new rules, we must determine what level of scrutiny the Supreme Court would apply here. The three traditional tests in this area are strict scrutiny, intermediate scrutiny, and rational basis.⁴⁶¹ Strict scrutiny generally only applies when the disparate treatment impinges on a fundamental right or is based on a suspect classification such as race.⁴⁶² Intermediate scrutiny has generally applied only in gender discrimination cases.⁴⁶³ The rational basis test - whether or not the classification is rationally related to a legitimate state interest - covers all other cases. While some commentators have assumed that evidence rules need only satisfy the rational basis test, Professor Imwinkelried has argued that a stricter scrutiny should apply in criminal cases.⁴⁶⁴ He rests this argument primarily on a line of cases that indicate the accused has a fundamental right to present defense evidence, implicit in the Sixth Amendment. So any government-imposed classification restricting this right unequally would require at least an intermediate scrutiny analysis.⁴⁶⁵

⁴⁶¹ IMWINKELRIED, *supra* note 12, § 10:28. See also GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 612-22 (1986).

⁴⁶² IMWINKELRIED, *supra* note 12, § 10:28.

⁴⁶³ *Id.* See, e.g., Craig v. Boren, 429 U.S. 190 (1976).

⁴⁶⁴ IMWINKELRIED, *supra* note 12, § 10:28.

⁴⁶⁵ *Id.*

The first classification theory - treating different crimes differently - seems to require no more than a cursory rational basis analysis.⁴⁶⁶ To ask if it is constitutional to burden those accused of certain crimes more than those accused of other crimes seems an easy question to answer. Every crime has different elements and different punishments. Treating different crimes differently easily satisfies the rational basis test on these counts. But what is the legitimate state interest in applying different rules of evidence to the process of trying a person for certain crimes? At this low level of scrutiny, the interest of convicting sex offenders and child molesters is at least legitimate. Because of the demonstrated predictive quality of the evidence admitted under the new rules, the Supreme Court would most likely find the new rules at least rationally related to this legitimate state interest. The problem with the legislative history of these new rules is that they lack any kind of legislative facts to support the predictive quality of the past offense evidence in these types of cases. The drafters seemed to rely mostly on common sense and anecdotal evidence in specific cases, rather than on any kind of scientific evidence.⁴⁶⁷ While the

⁴⁶⁶ The rules do not restrict the fundamental right to present a defense except in the Rule 412 and Rule 405 contexts, which will be dealt with next.

⁴⁶⁷ See, e.g., Karp, *supra* note 357, at 20. The only statistic I could find appeared in a footnote citing survey results showing that "offenders imprisoned for rape were 10.5 times more likely to be arrested for rape within three years of release than offenders imprisoned for other offenses." *Id.*

historical admissibility of this type of evidence will probably demonstrate its probative value, the case would be stronger with some additional evidence. Even additional legislative facts might not help if the Court applies a heightened level of scrutiny. Because the new rules arguably impinge on the fundamental right to an impartial jury, the Court might apply strict scrutiny and would be unlikely to find these rules necessary to serve a compelling state interest. Rule 404(b) admits the same evidence in most cases that the new rules would admit, but in a more limited and tailored way.⁴⁶⁸ This indicates the new rules of broader admissibility are simply unnecessary.

The second classification theory - treating the accused differently from the government - presents a more challenging constitutional question. The Supreme Court recognized in *Green v. Bock Laundry Machine Co.*,⁴⁶⁹ that the Fifth and Sixth

at 22 n.36 (citing BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1983 2, 6 (1989)). On the other hand, opponents of the new rules have cited similar surveys for the opposite proposition. See, e.g., Duane, *supra* note 404, at 113 (noting that "a substantial body of empirical research ... suggests that the recidivism rate for sex offenders is actually lower than for most other categories of serious crimes," and citing IMWINKELRIED, *supra* note 12, § 4:16 (collecting studies)); Park & Bryden, *supra* note 389, at 192 (apparently citing the same study cited by Karp, *supra*, for the proposition that "the recidivism rate was lower for sex offenders than for most other categories.").

⁴⁶⁸ See *supra* text accompanying notes 387-98.

⁴⁶⁹ 490 U.S. 504 (1989).

Amendments set up an unequal scheme of trial rights as between the prosecution and the defense.⁴⁷⁰ But in that scheme, the accused always came out with greater rights than the government. This reflected the framers' intent to ensure fair criminal trials. The Court also pointed out that "civil litigants in federal court share equally the protections of the Fifth Amendment's Due Process Clause."⁴⁷¹ The inevitable conclusion is that a criminal accused must enjoy **at least** the trial rights the government enjoys, and in some cases enjoys more rights.

When we apply this analysis to Rules 405, 412, 413, and 414, a certain inequality emerges. Rule 412, which applies in cases of alleged sexual misconduct, prevents the defense from presenting evidence of an alleged victim's sexual history except in very limited circumstances where such evidence would be relevant to a non-character purpose.⁴⁷² As we have seen, new Rules 413 and 414 specifically allow the government to present evidence of the accused's sexual history, even when its only relevance is to prove character.⁴⁷³ Working together, these rules clearly restrict the accused's right to present a defense far more than they restrict the government's right to

⁴⁷⁰ *Id.* at 510.

⁴⁷¹ *Id.*

⁴⁷² MCM, *supra* note 131, MIL. R. EVID. 412.

⁴⁷³ *See supra* text accompanying notes 399-412.

present evidence, impinging on that fundamental right that may then invoke a heightened level of scrutiny.

Drafter David Karp dismisses such an equal protection claim as "superficial" and such comparisons as "facile equations," arguing that the policies and realities behind the rules are different.⁴⁷⁴ Rule 412, he says, promotes victim cooperation and protects victim privacy, so a similar rule is unnecessary for criminal defendants since we do not need their cooperation and their sex crimes are not private acts.⁴⁷⁵ He also distinguishes the rules in terms of the probative value of the evidence they restrict or admit. Rule 412, he says, keeps out the normal sexual history of the innocent victim, while Rules 413 and 414 allow sexual history evidence that shows the accused is "in a small class of depraved criminals."⁴⁷⁶

While Mr. Karp's analysis is appealing, these rules are still inconsistent. The basic premise behind Rule 412 is that general character is not probative of conduct on a particular occasion. In other words, just because the victim of a sex crime might have "loose morals" and be prone to consent to sex

⁴⁷⁴ Karp, *supra* note 357, at 23-24. See also Park & Bryden, *supra* note 389, at 191 (rejecting this equating of the accused's and the victim's sexual histories).

⁴⁷⁵ Karp, *supra* note 357, at 23-24.

⁴⁷⁶ *Id.* at 24.

acts in almost any situation, this does not prove that this victim consented to the sex act with the accused. Rules 413 and 414 take the opposite view that even general character can be probative of conduct, so that even prior sex offenses that are completely dissimilar to the charged offense can be admitted to prove the charged offense. This inherent inconsistency will likely cause the new rules to fail any kind of stricter scrutiny than the mere rational basis test. Considering the lack of necessity for these new rules, this blatantly unequal treatment preventing the accused's use of character evidence on the very theory that they allow the government's use of character evidence denies equal protection to the accused.

Mr. Karp's analysis fails to address the unequal treatment inherent in the inconsistency between Rule 405 and the new rules. While Rules 413 and 414 will allow the government to present specific acts evidence to prove the accused's character, they do not provide a similar exception to Rule 405 for the accused to rebut that evidence. While some judges would likely allow the accused to present specific acts evidence to rebut specific acts evidence in the name of fairness, the rules do not require this. In fact, they prohibit it unless the new rules are interpreted to override Rule 405 completely. If an accused were prevented from using such evidence, this would result in another likely equal

protection violation. Fortunately, this is also one of the new rules' easiest problems to solve by a simple amendment allowing like-kind rebuttal.⁴⁷⁷

3. *Double Jeopardy*--The final constitutional issue is whether or not the new rules violate the Double Jeopardy Clause. If an accused is tried and acquitted for a sexual offense, the law generally prevents a retrial for the same offense.⁴⁷⁸ But under Rules 413 and 414, the government could charge this accused with another offense, with or without substantial evidence to prove it, and then present the evidence of the prior-acquitted offense to prove guilt of the new offense. Arguably the jury in the new trial could find the evidence of the new offense too tenuous to convict, but convict anyway because the accused's past shows he or she deserves it.⁴⁷⁹

Initially, the Supreme Court's decision in *Dowling v. United States*⁴⁸⁰ seems to indicate this is not a double jeopardy violation.⁴⁸¹ After all, a finding of "not guilty" is

⁴⁷⁷ See Duane, *supra* note 404, at 124.

⁴⁷⁸ See *supra* text accompanying notes 168-211.

⁴⁷⁹ This situation also raises the Eighth Amendment issue addressed earlier. See *supra* note 450.

⁴⁸⁰ 493 U.S. 342 (1990).

⁴⁸¹ See *supra* text accompanying notes 168-80.

not the same as a finding of innocence. The accused could have actually committed the prior act and the government simply failed to prove it beyond a reasonable doubt. If the evidence allows the new jury to reasonably conclude that the accused committed the prior offense, the evidence would be admissible under Rule 404(b) despite the prior acquittal. So why should any different result apply under the new rules?

One of the key factors in deciding that the prior-acquitted act evidence was proper was the limiting instruction the court gave to the jury in the second trial.⁴⁸² Rule 404(b) evidence is admitted only for a limited non-character purpose, when it comes in. Under the new rules, however, there are no such limits. Unless the court instructs the jury that they may not use the prior act evidence to infer that the accused is a "bad person" deserving of conviction and punishment, chances are good that the jury will use the evidence as they see fit.

If juries are allowed to convict an accused based on little more than the evidence presented at a prior trial, this will violate double jeopardy. Even if the second trial is nominally for a different offense, if the evidence of the different offense is lacking, the second trial will really be

⁴⁸² 493 U.S. at 346, 353.

a retrial of the first offense.⁴⁸³ Hopefully trial judges will prevent this kind of inquisition in their courtrooms, by holding the government to their burden of producing evidence of the charged offense. If all the prosecutor has to prove the charged offense is a prior-acquitted offense, the trial judge should grant a motion for a finding of not guilty to prevent an unconstitutional application of the new rules.⁴⁸⁴

D. *Policy Questions.*

David J. Karp justifies the new rules based on common sense and public policy.⁴⁸⁵ He argues that what has been called the "doctrine of chances"⁴⁸⁶ shows that the uncharged misconduct evidence admitted by these rules will be especially

⁴⁸³ Cf. *Grady v. Corbin*, 495 U.S. 508 (1990), overruled by *United States v. Dixon*, 509 U.S. 688 (1993). See *supra* text accompanying notes 181-95. But cf. *United States v. Felix*, 503 U.S. 378 (1992). See *supra* text accompanying notes 196-211.

⁴⁸⁴ Rule for Courts-Martial 917 requires the military judge to enter a finding of not guilty of an offense when "the evidence is insufficient to sustain a conviction of the offense affected." MCM, *supra* note 131, R.C.M. 917(a). Although the standard is lenient for the government to clear this hurdle, it does require "some evidence which, together with all **reasonable** inferences and applicable presumptions, could **reasonably** tend to establish **every essential element** of an offense charged." MCM, *supra* note 131, R.C.M. 917(d) (emphasis added). While prior-acquitted offense evidence could legitimately help corroborate evidence of a currently charged offense, the government must offer some evidence of the current offense to clear this hurdle.

⁴⁸⁵ See Karp, *supra* note 357, at 19-21.

⁴⁸⁶ See IMWINKELRIED, *supra* note 12, § 5:25.

probative. The theory is that the odds are against a person being falsely accused of similar offenses on more than one occasion. So if the government can offer evidence of a prior accusation, this shows a higher probability that the charged accusation is not false. As he states it: "It would be quite a coincidence if a person who just happened to be a chronic rapist was falsely or mistakenly implicated in a later crime of the same type."⁴⁸⁷

One problem with his analysis on this point is that the new rules require neither that the accused have been proven to be a rapist in the past, nor that his status be chronic. Rules 413 and 414 would allow any admissible evidence⁴⁸⁸ that the accused had committed even one other offense of the same general type. A prior allegation of sexual harassment seems to have but the very weakest probative value to prove a later rape.⁴⁸⁹ But more alarming than the mere overbreadth of the new rules is the message they send about our system of justice. Are we willing to sacrifice our sacred ideals of due process in favor of a system that allows convictions based on

⁴⁸⁷ Karp, *supra* note 357, at 20.

⁴⁸⁸ This discussion assumes that the intent of the rules prevails and that they are restricted by the other rules of evidence in terms of what evidence is admissible. See *supra* text accompanying notes 400-25.

⁴⁸⁹ See *supra* notes 401, 412.

"rounding up the usual suspects?"⁴⁹⁰ Merely because a person may have been accused of an offense in the past, do we want to forfeit their entitlement to the full protection of our Constitution? Certainly the person's past may suggest that further investigation is warranted, but their past alone should not be enough to convict them in a system that claims to afford due process of law.

Mr. Karp's second common sense argument is that the uncharged offense evidence shows a propensity towards a particular type of deviant behavior.⁴⁹¹ This argument is far more agreeable on an instinctive "gut feeling" level. We all probably accept that people who commit violent sex crimes and molest children are different than the rest of us. The historically recognized "lustful disposition" exception embodied that belief.⁴⁹² The problem again is primarily the

⁴⁹⁰ But see Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases*, 22 *FORDHAM URB. L.J.* 271, 273 (1995) (arguing that while this may be a danger in many cases, it would not be a danger in consent defense rape cases where the accused does not dispute that he is the perpetrator of the acts).

⁴⁹¹ Karp, *supra* note 357, at 20.

⁴⁹² See *supra* text accompanying notes 103-06, 390-99. In the psychiatric profession, "paraphiliacs" are those people who have "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting persons...." AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 522-23 (4th ed. 1994) (commonly known as the DSM-IV). "By definition, the fantasies and urges associated

overbreadth of the new rules. Would we all still agree that a person accused, but not convicted, of "acquaintance rape"⁴⁹³ has the same propensity as a violent "power" rapist?⁴⁹⁴ The broad definition of "sex offenses" in the new rules allows the use of evidence with much less probative value than the billboard examples used to sell them.

Mr Karp's public policy argument highlights the strong need for this type of evidence in these types of cases, noting

with these disorders are recurrent.... The disorders tend to be chronic and lifelong...." *Id.* at 524-25. *But see* Imwinkelried, *supra* note 450, at 297-98 (questioning the real probative value of this evidence citing statistics showing lower recidivism rates than for other crimes); IMWINKELRIED, *supra* note 12, § 4:16 (noting the common belief among laypersons and some medical authorities that sex offender recidivism rates are higher than for other offenses and citing more recent research discrediting this belief). *See supra* note 467.

⁴⁹³ For example, the accused and the alleged victim had been dating for some time and the accused thought it was time for the relationship to become sexually intimate. Without securing a clear consent, the accused had intercourse with the somewhat intoxicated victim. Later the victim charged the accused with rape, but the jury acquitted, presumably finding that the accused's belief that the victim had consented was at least reasonable. The testimony of the alleged victim in this case would be admissible in a later sexual assault prosecution under Rule 413. *See* FED. R. EVID. 413; 18 U.S.C. §§ 2241(b)(2), 2242(2) (1994); 10 U.S.C. § 920 (1994); MCM, *supra* note 131, pt. IV, ¶ 45c(1).

⁴⁹⁴ *See* A. Nicholas Groth et al., *Rape: Power, Anger, and Sexuality*, 134 AM. J. PSYCHIATRY 1239, 1240 (1977) ("One of the most basic observations one can make about rapists is that they are not all alike.... Our clinical experience has shown ... that in all cases of forcible rape three components are present: power, anger, and sexuality.... We have found that either power or anger dominates and that rape, rather than being primarily an expression of sexual desire, is, in fact, the use of sexuality to express issues of power and anger.").

the secretive nature of the crimes, the reluctance of victims to report and testify, and the danger these criminals present to the public.⁴⁹⁵ Specifically, he notes two key proof problems in these cases that uncharged offense evidence will help solve: rebutting a defense claim of consent in rape cases, and bolstering the credibility of child witnesses in child molestation cases.⁴⁹⁶ While these proof problems are real, and have caused many a prosecutor to offer uncharged misconduct evidence under a Rule 404(b) non-character rationale, they are really no worse than proof problems in other types of cases.

Professor Imwinkelried has addressed this issue as part of his equal protection analysis, indicating that many other crimes could claim at least as great a necessity for using criminal character evidence.⁴⁹⁷ At least with sex offenses, the victim is usually able to testify. Murder victims cannot testify at all, and theft victims are usually unable to identify the thief. Sex offenses allow the use of expert testimony⁴⁹⁸ and potential trace evidence to help corroborate

⁴⁹⁵ Karp, *supra* note 357, at 20-21.

⁴⁹⁶ *Id.* at 21.

⁴⁹⁷ Imwinkelried, *supra* note 450, at 299-300.

⁴⁹⁸ For example, explaining that inconsistencies in the victim's testimony are consistent with Rape Trauma Syndrome or Child Sexual Abuse Accommodation Syndrome. See, e.g., *United States v. Houser*, 36 M.J. 392 (C.M.A.), *cert. denied*, 114 S. Ct. 182 (1993); *United States v. Suarez*, 35 M.J. 374 (C.M.A.

the victims' testimony, giving the prosecutor "a wide array of evidentiary tools" that are not available for many other types of offenses.⁴⁹⁹ A quick re-examination of the Rule 404(b) case law in this area further demonstrates the new rules are unnecessary. Even if the courts reject my broadened approach to Rule 404(b) admissibility,⁵⁰⁰ ample federal precedent exists to admit uncharged sex offense and child molestation evidence under various accepted Rule 404(b) non-character rationales.⁵⁰¹ So in the military at least, necessity is not a valid reason to implement Rules 413 and 414.

So why has Congress given us these new rules? Because the pendulum has swung in that direction. Popular sentiment has long been growing that the courts let too many criminals off on technicalities, while they further brutalize the victims. These new evidence rules are a manifestation of these sentiments. Interestingly, these rules pulled two diverse political groups together: the "law and order" group and the "women's rights" group. The intent of the rules is to try to increase the likelihood of convicting a guilty sex offender, while providing greater protection and support to the victims who are predominantly women and children. What

1992).

⁴⁹⁹ Imwinkelried, *supra* note 450, at 299-300.

⁵⁰⁰ See *supra* text accompanying notes 387-98.

⁵⁰¹ See *supra* text accompanying notes 387-90.

can possibly be wrong with this? Nothing. The problems come from the unintended effects of the new rules.

Because the new rules allow a wide range of evidence that could easily be unfairly prejudicial to the accused, they rely on Rule 403 for their constitutionality. But Rule 403 shifts the burden of proof to the defense.⁵⁰² Instead of the prosecutor having to justify the legitimacy of the evidence, the defense will have to show that its unfair prejudice potential substantially outweighs its probative value.⁵⁰³ In a very real sense, this undermines the presumption of innocence. Even if the Supreme Court finds the new rules are constitutional, the analysis should not end there. Are they rules that conform with our national ideals of fairness? When you compare Rules 413 and 414 with Rule 412, is the disparate treatment of character evidence disconcerting? Has the pendulum swung too far in one direction?

The objectives of the new rules are laudable objectives.

⁵⁰² See SALTZBURG ET AL., *supra* note 129, at 435 ("The use of the word 'substantially' in the Rule suggests that in close cases the drafters intended that evidence should be admitted rather than excluded.... The Rule requires the trial judge to be confident that the evidence will do more harm than good before excluding it and removing it entirely from the case.").

⁵⁰³ See FED. R. EVID. 403; MCM, *supra* note 131, MIL. R. EVID. 403. See also Karp, *supra* note 357, at 19 & n.29 (quoting the unpublished analysis statement to the new rules as indicating "it is not expected ... that evidence admissible pursuant to proposed Rules 413-15 would often be excluded on the basis of Rule 403").

But in our zealous pursuit of criminals we must always remember that diminishing the rights of the guilty diminishes the rights of all of us. Of course we should support and assist the victims throughout the ordeal that a criminal trial puts them through. But more often than not, failure to care for the victims is not the fault of evidence rules, it is the fault of people. Congress has taken other productive steps to try to improve the way our system treats victims.⁵⁰⁴ But in a criminal trial our national public policy must not lose sight of the fact that the accused is the one on trial. The accused is the one presumed innocent and afforded due process rights to ensure the government does not unjustly convict him or her. If we allow unequal and unfair treatment of a certain class of accused because of moral outrage over their alleged crimes, then we are likely to find ourselves with less rights as well.

E. Recommendations.

⁵⁰⁴ See, e.g., Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended at 18 U.S.C. §§ 1512-15 (1994)); Victims of Crime Act of 1984, Pub. L. No. 98-473, tit. II, ch. XIV, 98 Stat. 2170 (codified as amended at 18 U.S.C. §§ 3013, 3663-64 (1994); 42 U.S.C. §§ 10601-05 (1988 & Supp. V 1993)); Victims' Rights and Restitution Act of 1990, Pub. L. No. 101-647, tit. V, 104 Stat. 4820 (codified as amended at 42 U.S.C. §§ 10606-07 (Supp. V 1993)). Congress has continued to provide additional assistance to crime victims through measures in the annual National Defense Authorization Act as well. See, e.g., National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, §§ 534-35, 108 Stat. 2663, 2761-63 (1994) (requiring consolidation of victims' advocates programs in the Department of Defense and providing transitional compensation and other benefits for dependents of members separated for dependent abuse).

Because these new rules are unnecessary, arguably unconstitutional, and alarmingly inquisitorial, I recommend that the President exercise his executive authority to remove them from the Military Rules of Evidence.⁵⁰⁵ Rule 404(b), as currently interpreted, is more than sufficient to meet the policy objectives behind the new rules, and it does so without opening the flood gates to as wide an assortment of the accused's personal history. Rule 404(b) places the burden on the government to show the relevance of uncharged misconduct, instead of on the accused to show irrelevance.⁵⁰⁶ This is the proper allocation of burdens in an accusatory system such as ours.

Presidential repeal of incorporated rules is not without precedent in the short history of the Military Rules of Evidence. A similar situation occurred in 1984 when Congress enacted Federal Rule of Evidence 704(b) as part of the Insanity Defense Reform Act.⁵⁰⁷ Often referred to as the "Hinckley exception" after President Reagan's attempted

⁵⁰⁵ Federal Rules of Evidence 413-415 were incorporated verbatim into the Military Rules of Evidence as of January 6, 1996, but Proposed Military Rules of Evidence to take their place are currently pending. See *supra* text accompanying notes 380-86.

⁵⁰⁶ See *supra* text accompanying notes 400-12, 502-03.

⁵⁰⁷ Pub. L. No. 98-473, tit. II, ch. IV, 98 Stat. 2058, 2067-68 (1984). See MCM, *supra* note 131, MIL. R. EVID. 704 analysis, app. 22 (1986 amendments); SALTZBURG ET AL., *supra* note 129, at 744-45.

assassin,⁵⁰⁸ Rule 704(b) prevents expert witnesses from stating an opinion on whether or not the accused had a mental state or condition constituting an element of an offense or defense.⁵⁰⁹ While this rule did become a part of the Military Rules of Evidence by automatic incorporation in April of 1985, it was never published in the *Manual for Courts-Martial*.⁵¹⁰ In February of 1986, the President rescinded the new rule and restored the original version of the rule.⁵¹¹ The general reason for the President's action was that the change was considered to be unnecessary in the military setting.⁵¹²

⁵⁰⁸ On March 30, 1981, John W. Hinckley, Jr., the son of a wealthy oil executive, attempted to assassinate President Reagan, firing at him with a revolver outside the Washington Hilton Hotel. David S. Broder, *Reagan Wounded by Assailant's Bullet*, THE WASHINGTON POST, Mar. 31, 1981, at A1. At trial, Hinckley relied on the insanity defense, and thanks to his family's financial position, he was able to present extensive psychiatric expert testimony. On June 21, 1982, he was found not guilty by reason of insanity. Major Rita R. Carroll, *Insanity Defense Reform*, 114 MIL. L. REV. 183, 184 (1986). This outcome outraged many, including many in Congress, and became one of the key catalysts in the move to reform the insanity defense. *Id.* at 184-85.

⁵⁰⁹ FED. R. EVID. 704(b).

⁵¹⁰ MCM, *supra* note 131, MIL. R. EVID. 704 analysis, app. 22 (February 1986 amendment).

⁵¹¹ SALTZBURG ET AL., *supra* note 129, at 745.

⁵¹² See MCM, *supra* note 131, MIL. R. EVID. 704 analysis, app. 22 (1986 amendment). The analysis states that: "The statutory qualifications for military court members reduce the risk that military court members will be unduly influenced by the presentation of ultimate opinion testimony from psychiatric experts." *Id.* Some might argue that an analogous argument actually supports the new rules and their broadened admissibility of evidence. On the contrary, military members, most of whom are more senior and have strong family values, are probably more likely than the general population to become

A similar Presidential repeal would be appropriate in the case of new Rules 413 and 414. Not only are they unnecessary in the military setting, they are far more likely to be applied in a military court-martial than in a federal trial, due to the higher volume of sex offenses tried in the military.⁵¹³ This presents a far greater danger for misapplication and for all of the other dangers associated with these new rules. Based on my experiences and discussions with military members, they are also far more likely than the average civilian to punish an accused for past misconduct, thus it is all the more important to ensure that this evidence does not reach them unless for a proper purpose.

If the President is concerned that some courts may be interpreting Rule 404(b) too restrictively, then the better remedy would be to amend that rule. Based on my argument that "character" should be defined narrowly in the rules, the following amended version of Rule 404(b) would clarify that specific propensities may be proven:

(b) Other crimes, wrongs, or acts. Evidence of

outraged and lose their impartiality when confronted with past sexual offenses of an accused, particularly offenses against children.

⁵¹³ See 1 SALTZBURG ET AL., *supra* note 387, at 577 (noting that "relatively few sex crime cases [are] tried in the federal Courts."); Duane, *supra* note 404, at 114 (noting that "Rape is not usually a federal offense.").

other crimes, wrongs, or acts is not admissible solely to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, ~~or~~ absence of mistake or accident, or any other relevant and specific propensity of the person, provided that upon request by the accused, the prosecution shall provide reasonable notice in advance of trial, or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.⁵¹⁴

In this amendment, the word "solely" clarifies that Rule 404(b) only prohibits uncharged misconduct evidence offered for no other purpose than to prove character. The additional language listing "relevant and specific propensity" as an allowable non-character purpose for using uncharged misconduct evidence clearly communicates to judges that "character" is a general term referring to a person's good or bad moral qualities and not to his or her tendencies and habits.⁵¹⁵

⁵¹⁴ See MCM, *supra* note 131, MIL. R. EVID. 404(b). In all of these proposed amendments, the original language I would delete is lined through and the additional language I would insert is bold and underlined.

⁵¹⁵ The first definition of "character" in BLACK'S LAW DICTIONARY reads: "The aggregate of the moral qualities which

Essentially this places "propensity" into a middle category between general character on the one end and ingrained habit on the other.⁵¹⁶ If this needs further clarification, Rule 404(c) could be added as follows:

(c) Definitions. "Character" means the general good or bad moral qualities of a person. "Propensity" means the specific tendency of a person to act in a certain way in a specific set of circumstances.⁵¹⁷

belong to and distinguish an individual person; the general result of the [sic] one's distinguishing attributes." BLACK'S LAW DICTIONARY 232 (6th ed. 1990).

⁵¹⁶ Habit evidence is already admissible under Rule 406, but frequent repetition must generally be shown to prove habit. MCM, *supra* note 131, MIL. R. EVID. 406; SALTZBURG ET AL., *supra* note 129, at 502-03. See also Rothstein, *supra* note 389, at 1265. One commentator has proposed amending Rule 406 to allow sexual "compulsion" evidence, instead of adding Rules 413-415. See James S. Liebman, *Violent Crime Control and Law Enforcement Act of 1994: Proposed Evidence Rules 413 to 415--Some Problems and Recommendations*, 20 DAYTON L. REV. 753, 759, 761 (1995).

⁵¹⁷ The United States Court of Appeals for the Armed Forces has recently defined "character" as 1) a pattern of repetitive behavior that is 2) morally praise-worthy or condemnable. *United States v. Gagan*, 43 M.J. 200, 202 (1995). This definition stresses that character is essentially a moral concept. My definition goes beyond this, distinguishing "character" from "propensity" according to the level of specific similarity of the pattern of behavior to the charged offense. While a person's propensity to molest children would almost certainly reflect poorly on his or her general character as well, under my proposed rule, evidence of that propensity would nevertheless be admissible, but only when the specific propensity itself is relevant. This approach is similar to that of the English courts, which have recently focused more on the probative value of the evidence and less on the "character" label attached to the evidence. See Edward J. Imwinkelried, *The Use of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines that Threaten to Engulf the*

The advantage of this amendment allowing any propensity, as opposed to one allowing only propensity to commit sex offenses, is that it avoids most of the disparate treatment inherent in Rules 413 and 414, and the potential equal protection challenges that would come with it. Not only are all offenses treated equally under the rule, but the parties are treated equally as well since Rule 404(b) is available to both the government and the defense.⁵¹⁸ If the President considers this amendment too radical under the circumstances, however, a more limited version could be substituted.⁵¹⁹

A further alternative to outright repeal or amending Rule

Character Evidence Prohibition, 130 MIL. L. REV. 41, 74 & n.185 (1990).

⁵¹⁸ Some of the disparate treatment of victims under Rule 412 would remain, but this is a relatively weak equal protection challenge, especially in light of the continued inadmissibility of "pure" character evidence under this amendment. See *supra* text accompanying notes 458-77.

⁵¹⁹ For example:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible solely to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, ~~or~~ absence of mistake or accident, or propensity to commit sex offenses, provided that upon request by the accused, the prosecution shall provide reasonable notice in advance of trial, or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

404(b) would be to amend Rules 413 and 414 to anticipate and correct some of the problems likely to be caused by their ambiguity and inherent conflicts with other rules.⁵²⁰ An amended version of Rule 413(a) might read as follows:

(a) Notwithstanding Mil. R. Evid. 404 and 405, but subject to the other provisions of these rules, in
~~In~~ a court-martial in which the accused is charged with an offense of sexual assault, specific acts evidence of the accused's commission of another similar offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant. If the prosecution offers specific acts evidence under this rule, the accused may offer specific acts evidence in rebuttal.⁵²¹

⁵²⁰ See *supra* text accompanying notes 399-425. The amendments to Rules 404 and 405 proposed in the Judicial Conference Report are another alternative for clarifying and implementing the Congressional intent behind Rules 413-415, but they are more difficult to comprehend as a whole and appear to go beyond what Congress intended to permit. JUD. CONF. REP., *supra* note 367, reprinted at 56 Crim. L. Rep. (BNA) 2139, at 2140-41. See *supra* text accompanying notes 367-77.

⁵²¹ The analogous amendment to Rule 414(a) would read as follows:

(a) Notwithstanding Mil. R. Evid. 404 and 405, but subject to the other provisions of these rules, in
~~In~~ a court-martial in which the accused is charged with an offense of child molestation, specific acts evidence of the accused's commission of another similar offense or offenses of child molestation is admissible, and may be considered for its bearing on

This amendment clarifies that the new rules are still subject to all other rules except for Rules 404 and 405, with which they necessarily conflict under the conventional definition of character evidence. It also explicitly limits proof of prior offenses to specific acts evidence to avoid potential offers of reputation or opinion evidence that the accused is a "pervert," a "child molester," or words to that effect. The word "similar," while still subject to interpretation and judicial discretion, adds a greater requirement of similarity between the charged and uncharged offenses to ensure that the uncharged offenses are at least somewhat probative of a propensity to commit the charged act. Finally, the second sentence adds a reciprocity absent in the current rules by allowing the accused to rebut specific acts evidence in-kind.

Beyond the question of whether or not to implement these new rules, other improvements in the way we prosecute sex offenders and child molesters can accomplish many of the same worthwhile goals. As Professor Imwinkelried points out, sex offenses lend themselves to the use of some very valuable evidentiary tools, such as expert testimony and forensic evidence.⁵²² If a need does exist to do a better job

any matter to which it is relevant. If the prosecution offers specific acts evidence under this rule, the accused may offer specific acts evidence in rebuttal.

⁵²² See *supra* text accompanying notes 497-99.

prosecuting these cases in the military, the best way to meet that need is by improving the prosecutor's access to these kinds of evidentiary resources, rather than relying on a more inquisitorial trial process. Tempting though it may be to blame an injustice on the "unreasonably protective" criminal justice system, we need to take a hard look at whether or not we really did everything allowed by that system to legally obtain the just result in the case. Our system and our fundamental ideals demand that we prove the accused's guilt, not presume it.

In the final analysis, just results depend on qualified judges exercising sound discretion. We will not agree with every decision or result, but our system is based on guaranteeing individual justice on a case-by-case basis, not pre-deciding cases in the legislature. Rules 404(b) and 403 allow judges to exercise discretion in admitting uncharged misconduct evidence.

This is the best guarantee of a fair trial. The judge can decide each case on its merits. No rule can ever foresee all cases, even when it is thoroughly researched, developed, drafted, and debated. In the case of Rules 413 and 414, the lack of thorough consideration in the rule-making process makes it all the more imperative that these rules not remain part of the Military Rules of Evidence in their current form.

VIII. Conclusion.

The general uncharged misconduct prohibition originated as a way to improve the fairness of trials by giving the accused fair notice of the charges to be tried and limiting the trial to only those charges. Even then the courts received uncharged misconduct evidence when it was directly relevant to the charged offenses. As common law courts interpreted this rule, they transformed it into a rule excluding all uncharged misconduct, with very narrow exceptions. Meanwhile, English juries transformed from groups of neighbors who knew the character of the accused to increasingly impartial bodies more capable of fair and unbiased verdicts. Because this impartiality was seen by our founding fathers as a fundamental requirement of a fair judicial system, they incorporated it as a matter of right in the Sixth Amendment. As the uncharged misconduct prohibition matured over the years, jurists began to realize that it was being interpreted too restrictively. When Federal Rule of Evidence 404(b) was ultimately codified, it embodied the rule that uncharged misconduct was prohibited only when offered solely to prove the character of the accused. While proving "bad character" would deny the accused the right to an impartial jury, uncharged misconduct evidence was allowed for any other relevant purpose. Military Rule of Evidence 404(b) is almost identical to the Federal Rule of Evidence and

therefore is subject to the same interpretations.

New Federal Rules of Evidence 413 and 414, enacted by Congress in 1994 to address a perceived difficulty in prosecuting sex offenders and child molesters, supersede Rule 404(b) in the cases in which they apply. But these rules are unnecessary, arguably unconstitutional, and laden with ambiguity and conflicts. Rule 404(b) is more than adequate to admit the kind of evidence the new rules seek to admit. The President should therefore exercise his executive authority to prevent Rules 413 and 414 from remaining as part of the Military Rules of Evidence in their current form.

**APPENDIX A
FEDERAL RULES OF EVIDENCE 413-415**

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the government intends to offer evidence under this Rule, the attorney for the government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other Rule.

(d) For purposes of this Rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved --

- (1) any conduct proscribed by chapter 109A of title 18, United States Code;
- (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
- (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
- (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
- (5) an attempt or conspiracy to engage in conduct described in paragraphs (1) - (4).

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the government intends to offer

evidence under this Rule, the attorney for the government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other Rule.

(d) For purposes of this Rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved --

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1) - (5).

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these Rules.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other Rule.

APPENDIX B
PROPOSED MILITARY RULES OF EVIDENCE 413-414
(With Proposed Analysis)

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

(a) In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government intends to offer evidence under this rule, the Government shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least five days before the scheduled date of trial or at such later time as the military judge may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule, offense of sexual assault means an offense punishable under the Uniform Code of Military Justice, or a crime under Federal law or the law of a State that involved-

(1) Any sexual act or sexual contact, without consent, proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;

(2) Contact, without consent, between any part of the accused's body or an object and the genitals or anus of another person;

(3) Contact, without consent, between the genitals or anus of the accused and any part of another person's body;

(4) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) An attempt or conspiracy to engage in conduct described in paragraphs (1) - (4).

(e) For purposes of this rule, the term sexual act means:

(1) Contact between the penis and the vulva or the penis and the anus, and for purposes of this rule contact involving the penis occurs upon penetration, however slight;

(2) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus:

(3) The penetration, however slight, of the anal or genital opening of another by hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(4) The intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(f) For purposes of this rule, the term sexual contact means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(g) For purposes of this rule, the term "State" includes a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and any other territory or possession of the United States.

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

(a) In a court-martial in which the accused is charged with an offense of child molestation, evidence of the accused's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government intends to offer evidence under this rule, the Government shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least five days before the scheduled date of trial or at such later time as the military judge may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule, child means a person below the age of sixteen, and offense of child molestation means an offense punishable under the Uniform Code of Military Justice, or a crime under Federal law or the law of a State that involved-

(1) Any sexual act or sexual contact with a child, proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;

(2) Any sexually explicit conduct with children, proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;

(3) Contact between any part of the accused's body or an object and the genitals or anus of a child;

(4) Contact between the genitals or anus of the accused and any part of the body of a child;

(5) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) An attempt or conspiracy to engage in conduct described in paragraphs (1) - (5).

(e) For purposes of this rule, the term sexual act means:

(1) Contact between the penis and the vulva or the penis and the anus, and for purposes of this rule contact involving the penis occurs upon penetration, however slight;

(2) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(3) The penetration, however slight, of the anal or genital opening of another by hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(4) The intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(f) For purposes of this rule, the term sexual contact means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(g) For purpose of this rule, the term sexually explicit conduct" means actual or simulated:

(1) Sexual intercourse, including genital-genital, oral-genital, or oral-anal, whether between persons of the same or opposite sex;

(2) Bestiality;

(3) Masturbation;

(4) Sadistic or masochistic abuse; or

(5) Lascivious exhibition of the genitals or pubic area of any person.

(h) For purposes of this rule, the term "State" includes a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and any other territory or possession of the United States.

The proposed analysis for the Rules (Appendix 22, M.R.E.) is as follows:

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

1996 Amendment. This amendment is intended to provide for more liberal admissibility of character evidence in criminal cases of sexual assault where the accused has committed a prior act of sexual assault.

Rule 413 is nearly identical to its Federal Rule counterpart. A number of changes were made, however, to tailor the Rule to military practice. First, all references to Federal Rule 415 were deleted, as it applies only to civil proceedings. Second, military justice terminology was substituted where appropriate (e.g. accused for defendant, court-martial for case). Third, the five-day notice requirement in Rule 413(b) replaced a fifteen-day notice requirement in the Federal Rule. A five-day requirement is better suited to military discovery practice. Fourth, Rule 413(d) has been modified to include violations of the Uniform Code of Military Justice. Also, the phrase "without consent" was added to Rule 413(d) (1) to specifically exclude the introduction of evidence concerning adultery or consensual sodomy. Last, all incorporation by way of reference was removed by adding subsections (e), (f), and (g). The definitions in those subsections were taken directly from title 18, United States Code §§ 2246(2), 2246(3), and 513(c)(5), respectively.

Although the Rule states that the evidence "is admissible," the drafters' intend that the courts apply Rule 403 balancing to such evidence. Apparently, this also was the intent of Congress. The legislative history reveals that "the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court's authority under Evidence Rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect." 156 F.R.D. 51 (1995) (Reprint of the Floor Statement of the Principal House Sponsor, Representative Susan Molinari, Concerning the Prior Crimes Evidence Rules for Sexual Assault and Child Molestation Cases).

When "weighing the probative value of such evidence, the court may, as part of its Rule 403 determination, consider proximity in time to the charged or predicate misconduct; similarity to the charged or predicate misconduct; frequency of the other acts; surrounding circumstances; relevant intervening events; and other relevant similarities or differences." 156 F.R.D. 51, 55 (1995) (Report of the Judicial Conference of the United States on the

Admission of Character Evidence in Certain Sexual Misconduct Cases).

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

1996 Amendment. This amendment is intended to provide for more liberal admissibility of character evidence in criminal cases of child molestation where the accused has committed a prior act of sexual assault or child molestation.

Rule 414 is nearly identical to its Federal Rule counterpart. A number of changes were made, however, to tailor the Rule to military practice. First, all references to Federal Rule 415 were deleted, as it applies only to civil proceedings. Second, military justice terminology was substituted where appropriate (e.g. accused for defendant, court-martial for case). Third, the five-day notice requirement in Rule 414(b) replaced a fifteen-day notice requirement in the Federal rule. A five-day requirement is better suited to military discovery practice. Fourth, Rule 414(d) has been modified to include violations of the Uniform Code of Military Justice. Last, all incorporation by way of reference was removed by adding subsections (e) (f), (g), and (h). The definitions in those subsections were taken directly from title 18, United States Code §§ 2246(2), 2246(3), 2256(2), and 513(c)(5), respectively.

Although the Rule states that the evidence "is admissible," the drafters' intend that the courts apply Rule 403 balancing to such evidence. Apparently, this was also the intent of Congress. The legislative history reveals that "the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court's authority under Evidence Rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect." 156 F.R.D. 51 (1995) (Reprint of the Floor Statement of the Principal House Sponsor, Representative Susan Molinari, Concerning the Prior Crime Evidence Rules for Sexual Assault and Child Molestation Cases).

When "weighing the probative value of such evidence, the court may, as part of its Rule 403 determination, consider proximity in time to the charged or predicate misconduct; similarity to the charged or predicated misconduct; frequency of the other acts; surrounding circumstances; relevant intervening events; and other relevant similarities or differences." 156 F.R.D. 51, 55 (1995) (Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases.).